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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 3, Original of 1921

THE STATE OF WYOMING, COMPLAINANT,

vs.

THE STATE OF COLORADO, THE GREELEY-POUDRE IRRIGATION DISTRICT, AND THE LARAMIE RESERVOIRS AND IRRIGATION COMPANY, DEFENDANTS.

PETITION FOR REHEARING.

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Of Counsel.

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To the Honorable the Judges of the Supreme Court of the United States:

The State of Colorado, The Greeley-Poudre Irrigation District, and The Laramie Reservoirs and Irrigation Company, defendants herein, respectfully present their petition for a rehearing and submit the reasons hereinafter stated in support thereof:

I.

In both the opinion and the final decree, the court inadvertently omitted mention and due recognition of the long-

established diversion and use of water from the headwaters of Deadman creek in Colorado by means of that part or unit of the Divide or Sand Creek system which diverts water from Deadman creek and conveys the same over into Sand creek for rediversion into the Cache la Poudre river. Deadman creek is a tributary of the Colorado portion of the Laramie river, entering that stream a number of miles above the interstate line. Long prior to the initiation of the tunnel project in Colorado or of the more recent projects in Wyoming, the Divide Canal system was constructed and has since hitherto been annually maintained and operated. It includes (1) a canal at the very headwaters of Deadman creek, known as the "Wilson Supply Ditch," whose function has been to divert water from that stream and to convey the same over into the headwaters of Sand creek. This water flows down Sand creek to (2) the Sand Creek or Divide Canal, by means whereof the water from Deadman creek and some water from Sand creek is carried over into Sheep creek, a tributary of the Cache la Poudre, and the remaining waters of Sand creek continue their flow into the State of Wyoming.

The recognition or omission of this diversion in no manner affects the conclusions of the court respecting the water supply at Wood's Landing for the same reasons assigned with respect to the Skyline canal in Colorado, but we respectfully suggest that the failure to specifically recognize this early Colorado appropriation in the final decree may lead to future uncertainty and to the erroneous conclusion that the right of the State of Colorado and of its citizens to continue their diversions from Deadman creek in the future as in the past was not protected by the decree in this case. (See map attached to defendants' answer; Record, fols. 1398, 1607 and

1636; Defendants' Brief, vol. II, p. 133; Defendants' Supplemental Brief, vol. II, p. 91.)

II.

Whatever degree of conclusiveness may be given by this court to the decrees of the courts of the State of Colorado fixing and determining the local status of priorities of appropriation respecting the waters of this stream, such decrees at least should be persuasive.

The priority of the appropriation of the Laramie Poudre Tunnel project was judicially determined by the District Court of Larimer County, Colorado, to be as of August 25, 1902, and the decree of that court is binding and conclusive upon Colorado appropriators. (See copy of decree, Exhibit 179.) If given full faith and credit, it would conclusively and completely dispose of the question of the date of the priority of the tunnel project as of the year 1902 rather than as of the year 1909, adopted by this court. But, regardless of this judicial determination, the facts revealed by the evidence before this court clearly entitle the tunnel project to a much earlier priority than October, 1909, under the doctrine announced by this court in the opinion wherein it is said:

> "As between different appropriations from the same stream, the one first in time was deemed superior in right, and a completed appropriation was regarded as effective from the time the purpose to make it was definitely formed and actual work thereon was begun, provided the work was carried to completion with reasonable diligence" (p. 4).

The evidence which entitles the tunnel project to a priority date of August 25, 1902, or at the very latest of May 22,

1904, is exhaustively reviewed in volume II, pages 138 to 188, inclusive, of the original brief for defendants, and again in volume II, pages 113 to 140, inclusive, of the supplemental brief for defendants, and need not be here repeated. But, constituting as it does the very crux of the case, in view of the fundamental principles announced by the opinion, the date from which this great enterprise may be said to have commenced its undertaking becomes of transcendent importance, and is the guide point controlling the final disposition of the case. In the fixing of this date a misinterpretation of the facts, or a failure to attribute a proper degree of good faith to those whose purpose it was to build the tunnel enterprise or to those who later collected the forces which both started and kept in motion the human as well as the physical elements which finally effected the completion of the project, may work a tremendous and irreparable injury both upon the State and upon those of its citizens whose credit and treasure have been availed of to bring into being one of the instrumentalities by the use of which the State and the people may prosper and endure. We believe an injustice has been done the defendants by the court in this regard, and we earnestly urge a reconsideration of this vital phase of the case.

Briefly stated, the tunnel project (including *three* collection ditches) was definitely conceived in 1902 and surveys were commenced on August 25th of that year and followed by extensive road building in 1903. The first definite survey of the tunnel, on the exact line where later constructed, was made in March, 1904, and on May 22, 1904, another engineer commenced a resurvey of the same tunnel line (Rec., fols. 1891 and 1898). This latter engineer (Duvall)

not only made the definite location of the line of the tunnel where later constructed, but also made a survey of the whole tunnel system, with three collection ditches, *including the Upper Rawah ditch*, and was engineer in charge of the actual construction which proceeded throughout the entire summer on the lines definitely located by him. The first actual ditch construction accrued prior to June 10, 1904, at which date a ditch was completed at the west portal of the tunnel (fol. 1885) and water turned from the West fork of the Laramie across to the East fork. The construction crew then was moved up the valley of the West fork and commenced the first excavation work on the Upper Rawah ditch *upon the final and definite survey made by Duvall.* This ditch collects water from other tributaries of the Laramie and carries the same over into the West fork, where it flows down to the west portal of the tunnel. Every dollar of expenditure in construction made subsequent to May 22, 1904, was directed to the fulfillment of the final designs of the builders represented by Duvall surveys. The tunnel was first definitely located by him on the line where it now operates. He next located the three (not two) ditches leading to the tunnel. The first construction was upon the ditch at the west portal which now conveys water to the tunnel. The next was upon the Upper Rawah ditch on the Duvall line and under his direction, and that canal, now carrying water into the West fork and down to the tunnel, was constructed in conformity with his 1904 stakes. *It was never abandoned.* The other two collection ditches were constructed substantially as located by Duvall, with some insignificant betterments of location. In fact, the large sums of money expended in construction upon the tunnel system between

1904 and the time work was delayed by reason of this suit, were all expended in fulfillment of a purpose to build this very tunnel, and its three collecting canals, definitely formed prior to May 22, 1904. The work of 1902 and 1903 was all availed of and included within the more complete work of 1904. The 1904 surveys were subjected to proof by subsequent checking and surveys of alternate possibilities in the manner demanded by good engineering and prudent investment and along lines ordinarily followed by engineers of the Reclamation Service and private institutions. But the ultimate fact remains that the project has been largely completed and was put into partial operation in 1914 (see folio 4396) in complete harmony with the original plans and upon the lines definitely surveyed and upon which actual construction proceeded during 1904 and subsequent years.

The doctrine of relation is applied with respect to irrigation works in much the same manner and upon somewhat similar principles obtaining with respect to mines. The mining customs, laws, and decisions long since established certain principles with respect to reasonable diligence in the prosecution of work, among which may be mentioned: the building of necessary roads is, in effect, work upon the mines; work upon any one claim of a group or system of claims in legal effect is work upon all the claims, etc. Similar rules apply with respect to irrigation works, and where other and additional units are subsequently incorporated into an established system, they thereafter become a part of the composite instrumentality by which the final reclamation is to be brought about, even though the added units in and of themselves may not be related back to the date of the parent project. The whole problem is that of reason-

able diligence upon the composite project. Reasonable diligence, necessarily, is largely a question of fact and takes into consideration all the surrounding conditions and circumstances. The appropriator is only required to do that which would be reasonably expected of prudent men laboring under similar conditions and undertaking construction of enterprises of like magnitude at similar times. Very few efforts of similar character, difficulties, and magnitude to that of the tunnel project here involved have been undertaken by private capital in the history of irrigation development. There are few analogous cases with which to make comparison. The Federal Reclamation Service furnishes the nearest parallel in the matter of magnitude, but the almost unlimited finances and assisting Federal agencies at the command of the Reclamation Service give advantages not to be expected or required of private institutions. But, even as to such, the eight years involved in the construction and near completion of an enterprise of the magnitude of the tunnel enterprise here involved (from 1902 to the filing of the suit herein) would not be considered an unreasonable time within which to accomplish so great a task, even though unhampered with those other and additional impediments thrown across the path of private undertakings.

The record shows a general continuity of purpose and effort (from 1902 and in any event from 1904) directed toward the identical enterprise now in large part completed. The efforts from the founders down through succeeding builders have finally resulted in the near completion of the original conception. While small variances and departures of detail have occurred, they have but bettered the means of fulfilling the diversion originally contemplated. Such being

the case, to now hold that new projects in Wyoming, first commenced in 1908 and 1909, may be given a preference and priority superior to the tunnel project in Colorado is not only to declare the $800,000 theretofore spent upon the Colorado system, 1902 to 1909, to have been useless and unavailing, but, more, to unjustly deprive the Colorado enterprise of the major portion of its water supply.

We earnestly pray that the court again consider the record for the purpose of establishing the relative priority of the tunnel project, the essential parts whereof appear in defendants' briefs at the pages above indicated and which briefs also contain complete answer to misinterpretations of the evidence; that the tunnel project be found to have its proper priority, and that the waters of the river be reapportioned to conform to the superiority of the tunnel enterprise over the newer and junior enterprises in Wyoming.

III.

In this case Wyoming sought to enjoin the defendants from diverting any water from the Laramie River basin to the Poudre River basin. The court held that the position of Wyoming was "untenable," saying, "In neither State does the right of appropriation depend upon the place of use being within the watershed. Diversions from one watershed to another are commonly made in both States, and the practice is recognized by the decisions of their courts." Wyoming sought an injunction to wholly restrain the diversion of any water by the tunnel project in Colorado upon the ground Wyoming had made prior appropriation of all the waters of the river. The court decreed to Colorado the right to divert

not more than 15,500 acre-feet annually, notwithstanding the claims of Wyoming.

Wyoming contended that it need not provide storage for the high flows of the river. This court held that it was incumbent upon Wyoming to make reasonably adequate provision for such storage in order to effect the conservation of the waters flowing into that State from Colorado.

By reason of the above-mentioned rulings, as well as of other aspects of the case, it is evident, in the final analysis of the case as a whole, the costs should not be wholly assessed against the defendants, but that the costs should be equally divided between the two States in conformity with the usual rule in such cases, especially where relief is granted to both parties. In Kansas *vs.* Colorado, although the complaint of Kansas was dismissed and no relief granted, each party was adjudged to pay its own costs. In boundary disputes between States the general rule is to divide the costs between the parties involved. In numerous instances, with which the court is no doubt familiar, that rule has been applied.

Missouri *vs.* Iowa, 160 U. S., 688.
Indiana *vs.* Kentucky, 163 U. S., 520.
Tenn. *vs.* Virginia, 177 U. S., 501.
Kansas *vs.* Colorado, 206 U. S., 46.
Maryland *vs.* West Virginia, 217 U. S., 1.
U. S. *vs.* Texas, 162 U. S., 1.

IV.

In rendering its decision the court failed to apply the doctrine of equitable apportionment as defined in the case of *Kansas vs. Colorado*. According to the testimony submitted

in this case, Colorado produces more than one-half of the water of the Laramie river. Under the decision herein, Colorado is limited to 37,750 acre-feet annually (Skyline, 18,000, plus Colorado Meadows, 4,250, plus Laramie-Poudre tunnel, 15,500). The court determines the water supply available to the Wyoming lands as follows:

Laramie river at Wood's	170,000	a.-ft.
Little Laramie river	93,000	"
Lower tributaries	25,000	"
Total	288,000	"
Adding the Colorado Trans-mountain diversion and consumption	22,250	"
The total water supply will be	310,250	"

The 37,750 acre-feet annual Colorado allotment is about 13 per cent of the Basin water supply, and the Wyoming allotment is about 87 per cent of the total water supply.

The court analysis evidently omits the North Laramie production of 25,000 acre-feet and Chugwater production of 20,000 acre-feet. Adding these figures, 45,000 acre-feet, to the 310,250 acre-feet, makes a total of 355,250 acre-feet Basin water supply.

Under the court's analysis, Colorado will receive for utilization approximately one-eighth of the Laramie Basin water supply and Wyoming seven-eighths, notwithstanding Colorado produces one-half of the water supply and the more dependable one-half, if that term can be permitted.

The fact that both States within their borders recognize the doctrine of prior appropriation does not take away the

sovereignty of either State. Under the circumstances set forth in this case Colorado has not, in our opinion, received an equitable proportion of the waters of the Laramie river, and, unless, under the facts herein, the court desires to adopt a rule different from that in the Kansas-Colorado case, a greater proportion than one-eighth of the water of the Laramie river should be allotted to Colorado.

It is laid down in Kansas *vs.* Colorado that the proper rule to be applied in case of an interstate stream is that of equitable apportionment of benefits between the States involved. This does not mean a division among States according to the doctrine of *prior appropriation*. Interstate priority is inconsistent with the rule of equitable division.

In ignoring State lines and applying the doctrine of prior appropriation—first in time, superior in right—to controversies between States over interstate streams, it is obvious that the court has departed from the views expressed in the pioneer case of *Kansas vs. Colorado,* 206 U. S., 46.

The decision in the case at bar is apparently committed to the doctrine of prior appropriation between States regardless of State lines in interstate stream controversies. The Kansas-Colorado case favored equitable apportionment. The latter is not governed by any fixed or definite rule that must be followed in all cases, but depends upon the circumstances of each particular case, which, all things considered, will be just, fair, and right.

Equitable apportionment will take into consideration the respective needs of the different States, the quantity of land to be irrigated, the quantity and value of crops per acre which can be grown in each State, the quantity of water contributed by each State to the total volume of the stream, the oppor-

tunity which each State affords for the repeated use of each acre-foot of water diverted, the quantity and value of crops produced by the consumptive use of each acre-foot, the extent of the non-consumptive use in each State as to every acre-foot diverted, and also a consideration of the fact that it is more economical to use water first along the upper reaches of the river and then continue the use along the lower reaches.

If it can be that the degree of sovereignty possessed by a State is not sufficient to authorize the State to create, in favor of its citizens, water rights calling for all of the water contributed by the State to the interstate stream, then we wish to develop for the consideration of the court the alternative rule of "equitable division" laid down in *Kansas vs. Colorado*.

"Priority regardless of State lines" is really "interstate priority," and to whatever extent it exists it is an exclusion of one State in favor of the other and to that extent is a monopoly of the waters of the interstate stream. If, for instance, the appropriators in one State are the first ones to appropriate as much as three-fourths of the water, they get the three-fourths and those in the other State get only one-fourth. If they are the first to appropriate all of the water, they get all and the appropriators in the other State get none. Under this rule, although the resource by nature is common to the citizens of both States, the actual enjoyment becomes exclusive in favor of one State or the other according to the percentage of priority.

The percentage of priority even may be due to nothing but accident. It may turn, for example, on the nearer presence of a railroad to one part of the interstate stream than to another where the land might be even more produc-

tive. It may be due to some colonization scheme under which a certain area for operation is chosen, even without inspecting other areas where the returns would have been greater. The percentage may be accounted for by the financial ability of the appropriators to construct a water project in a certain given area instead of a different one. Again it may be due merely to the fact that the appropriators knew of a possibility in one State, but did not know of an even better one in the other State. Thus "priority regardless of State lines" is interstate priority or interstate discrimination, and, according to its percentage is a monopoly in favor of one State as against the other, is not predicated on State sovereignty or authority in any degree and may not possess even the merit of being supported by economical and productive use of the water thus monopolized. The rule violates the principle of equality of the States as to their political rank and as to their equal right of economical development. The rule of "equitable division," on the other hand, takes account of each State upon the stream. It may always be counted upon to give each State at least a substantial portion of the flow without regard to relative dates of priority. It guarantees, in a small measure, the future of each State. It impoverishes no State to enrich another. It appeals to the sense of equality among the States and makes their respective peoples glad they belong to a Federal Union.

The injustice of the rule of interstate priority contended for by Wyoming appears in marked degree in this very case. Under the application of the rule of "interstate priority" Colorado would receive, as found by the court, only a very small part of what it produces, while Wyoming not only receives all it contributes, but nearly 80 per cent of the

amount produced by Colorado. Yet Colorado's lands are just as productive—in fact, far more productive—per acre than those of Wyoming, and her rank as a State is equal. How unjust must be that rule which can produce such a result as between member States of the same Union. The only respect in which the working of the rule might be more unjust would be in the event that appropriators of Wyoming should have been the first to appropriate all of the water of the stream found in both States instead of only most of it, in which event Colorado would have had none.

Although nations may not be so obligated by law, their practice in respect to international rivers reveals the fact that as to commercial navigation these streams are not subject to monopoly by any nation, but are treated as natural resources, subject to a community of interest on the part of coriparian nations and frequently in favor of even non-riparian nations.

By various treaties, beginning with the treaty of Paris in 1814, the Rhine, Neckar, Main, Moselle, Meuse, Scheldt, Po, Congo, Danube, Niger, Elbe, Wesser, and Amazon rivers have been subjected to the principle of community of commercial navigation in favor of the coriparian nations, and in many instances in favor of non-riparian nations.

> Kaeckenbeeck, International Rivers (published by Sweet & Maxwell, Ltd., for the Grotius Society), sections 43-77, 99-125, 181-265, 266, 305-8, 324-326.

The United States, by treaties with Spain, Great Britain, and Mexico, has extended the principle of community of

commercial navigation to the Mississippi, St. Lawrence, and the Great Lakes and to the Rio Grande.

Kaeckenbeeck, International Rivers, sections 324-325.

I Malloy's Treaties and Conventions, article XXVI, p. 711, and article XXX, p. 712, and articles VI and VII, page 1111, and article IV, page 1123.

Uses of international streams for irrigation seem to follow the same community principle.

The treaty between the United States and Mexico of 1906, concerning the Rio Grande, allocated to Mexico 60,000 acre-feet per annum out of a reservoir which was to have been constructed near Engle, New Mexico, the delivery of the water to be in the bed of the Rio Grande at the headgate of Acequia Madre, above Juarez, Mexico (I Malloy's Treaties and Conventions, arts. I and II, pp. 1202 and 1203)

The United States and Great Britain, by the treaty of 1909, concerning varicus boundary waters, including the Milk river, which rises in the province of Alberta, Canada, and flows into the State of Montana, and including the St. Mary river, which rises in the State of Montana and flows into the province of Alberta, declared the two rivers should be treated as one and should be divided equally, and then specifically allocated: to the United States, in respect to the Milk river, a priority of right to 500 cubic feet per second or so much of such amount as should constitute three-fourths of the natural flow, and to Canada, in respect to the St. Mary river, a priority of right to 500 cubic feet per second of the flow of that river or so much of such amount as should constitute three-fourths of the natural flow, leaving the remainder in each instance to the other country (III Charles, Treaties and Conventions, art. VI, p. 42).

Although the priority of right which is agreed to is spoken of in that treaty as an "appropriation," yet it is evident, from the even numbers used in terms of cubic feet as to each river and from the even proportions exchanged and from the equal division, that the allocation could not have been made upon any basis of regard for dates of application to use along the two rivers in the two different countries, but that each country recognized that the other had an equality of right and interest in these international streams and to the waters thereof.

Surely one State of our own Union should be treated by other States, under a judicial rule to be formulated, as favorably as one nation would be treated by another.

The principle of equitable division or apportionment, if adopted as the interstate rule, will lead to greater wealth production in the arid region than will the principle of interstate priority. Every one familiar with irrigation knows that the lands which cannot have water because of scarcity, but which, nevertheless, lie in the vicinity of lands which do receive water, are more useful, other things being equal, than those lands not near enough to be used in connection with the areas which are irrigated. With irrigated lands as a base, dry farming is more easily and safely extended to the non-irrigated lands, and so, too, the use of these lands is more frequent and valuable for grazing purposes. It is best, therefore, from the standpoint of maximum productivity, that the irrigated areas be well scattered throughout the arid region. If it happens, under a system based on appropriation regardless of State lines, that the early priorities are fairly evenly divided between the two States, then the irrigated areas will be well distributed, but if the great

bulk of the earlier priorities belong to a single State, then the resulting monopoly or near monopoly of the waters of an interstate stream consolidates the irrigated areas within that particular one of the States, and the available and dependent dry areas with their production likewise become correspondingly limited. Under the principle of equitable division a wide diffusion of irrigated lands is always guaranteed, because the principle accords to each State a substantial portion of the waters of the interstate stream. It is scarcely necessary to point out that the greater productivity resulting from a system based upon an equitable division or apportionment of the water admits of the maintenance of a more widely diffused and greater population.

The rule of "equitable division" favors government reclamation work in the arid region. The rule of "interstate priority" retards it. Hitherto Government projects have been looked upon as a blessing to all the western States. Hitherto, however, it has not been supposed that a Government project on an interstate stream carried with its heavy withdrawal of water any priority against subsequent uses and appropriations of water in other States on the same stream. Indeed, in the rule laid down in *Kansas vs. Colorado*, the States thought they had the assurance that no such priority was to be feared. If now the rule is to be changed, then the Government reclamation project in any one State becomes a deadly menace to the later development of every other State upon an interstate stream, and the other States must stand like a wall against consent by Congress to the construction of any such project.

How different under the rule of "equitable division"! Under this rule each State upon the stream knows that it

may have an equitable portion of the water and may parcel out that portion within its own boundaries under any system of water rights which it may choose—riparian, appropriation, or both riparian and appropriation combined, as in several of the western States—and that no State need fear the blight of "interstate priority," and that no State need fear that it is going to be robbed of its water by a Government project in a neighboring State upon the same stream.

In choosing a rule to govern distribution between States, it would seem that one should be chosen which will permit the development of every State and not allow one State to be enriched at the expense of another.

"Equitable division" is entirely feasible. As between States which are riparian in their water systems and as between States where one is priority and the other is either riparian or riparian and priority combined with the priority rights carved out of and derived from previously existing riparian rights, "equitable division" is the only rule which can be applied. "Interstate priority" or "priority regardless of State lines" in such a case becomes unworkable, since it is impossible to divide waters according to priorities regardless of State lines when on one side of the line the water rights are riparian and not priority rights or else are riparian and priority rights combined. If the rule for which we contend is possible as between such States, it is equally possible between purely priority or appropriation States, such as Colorado and Wyoming.

There are still other evidences of its feasibility. Irrigation, through the exercise of riparian rights, is a lawful and well-known use of water in the ten western States in which the dual system of riparian rights and appropriation rights

prevails, just as is true of the appropriation or priority rights also. As between the various riparian rights upon which water is drawn from any single stream in any one of these States, priorities of use become immaterial and there is left, as the principle governing distribution among the riparian proprietors, only the well-known rule that each riparian proprietor may make a reasonable use of the water of the stream subject to the equal right of the other riparian proprietors likewise to make a reasonable use. This, in substance, is the rule of "equitable division," although applied among individuals rather than between States.

Although irrigation does not greatly prevail in the eastern States, the rule governing other uses is the general rule of equality in the right to make a reasonable use which, although sometimes difficult of ascertainment on application, is nevertheless found feasible as a working basis of administration.

As applied to the Laramie river, in the present case, the topographical conditions are such that Colorado cannot divert more than about 85,000 acre-feet per annum, which, considering her contribution to the volume of the river, and considering the needs of both States, surely would be within her "equitable division."

Counsel argue that because the States of Wyoming and Colorado apply the priority principle within their own respective boundaries that therefore it should be applied as between them. They overlook, however, two factors involved in that suggestion. One relates to the origin of the priority system; the other to the political character of the States.

The priority appropriation system owes its origin to the scarcity of water and to the necessity of using it upon lands

non-riparian as well as riparian. Better for the community welfare where water is scarce that some should have enough to put to beneficial use than that the supply should be so minutely divided that no one could have enough. Better, therefore, in the arid region a system of priorities based upon respective dates of appropriation than the riparian system which is based upon the theory of equality in the right to make a reasonable use and which knows no limit upon the number of water users less than the number who can acquire lands riparian to the stream. Geographically, a State is an area large enough to accumulate a volume of water in its different streams, sufficient in respect to any such stream to supply the uses of many appropriators within the State on a basis worth while in point both of nature and extent of use and in point of administration. A priority system, therefore, may well be adopted and applied within an area as small as that of a State. It is not at all necessary, in order to insure its successful operation, that it should function in an area that is more extensive.

As for the other factor overlooked, which is the political status of the State, an entity partially sovereign in character, and entitled as against other States to an equal right to economic development. To assign a single priority or appropriation system to an area of lands lying in more than one State is to do more than is physically necessary to the maintenance of a priority system and is to violate the principles of equality prevailing among the States by substituting the accident of prior appropriation, with its accompanying possibility of monopoly or near monopoly of use, for an equitable division which is based on reason rather than on accident and which effectuates a more substantial and equitable distribution of water.

It is not at all against soundness of the rule of equitable division that, as between individual appropriators taking water from the same interstate stream, we find instances of priority States enforcing through their courts the appropriation or priority rule regardless of State lines. That the courts occasionally do this is purely a matter of voluntary "concurrence" and not of comity or necessity. The question of equitable division between States should be raised only at infrequent intervals, after the most thorough investigation of relevant facts, and in the most solemn manner. In other words, it should be raised only by the States themselves in a suit between them for that purpose in this court in order that they and their respective citizens may have the service of the best of engineering, legal, and judicial ability. To permit private litigants to present such a question in their private litigation would result in the presentation of a paramount public question in a manner so inadequate and so annoyingly frequent that water rights in both States to the controversy would be forever uncertain as to the quantity of water, and all investment in enterprises dependent upon water correspondingly insecure. Unless and until the States themselves take formal action the interstate-priority rule makes a comparatively simple one for courts to apply as between interstate appropriators. Thus the enforcement of a principle of interstate priority in private litigation is stripped of every shred of authority as a precedent when the States themselves assert their paramount interests, thrust "concurrence" and comity aside, and engage each other in judicial combat, not for an exchange of courtesies, but for their economic life. In such an hour regard should be had only for the principles of equality in rank and right to development and to

the rule of distribution which these principles inexorably impose.

Administrative supervision and regulation of appropriations of a priority system among States, if State boundaries are to be disregarded, is impossible.

The problem in administrative supervision and regulation is not merely one of ascertaining the dates and amounts of the different appropriations concerned and fixing their respective priorities. That is exclusively a judicial function in some of the States, as in Colorado, and in other States, and in Wyoming is judicial in last analysis, because of the fact that the preliminary administrative determination is subject to judicial review. The real difficulty of administrative supervision and control arises after the priorities as to date and amount have been already determined. In all of the States there are periods of water scarcity, also appropriators who waste water, and, furthermore, there are appropriators who, if left to themselves, take water from the streams although well knowing that there are senior appropriators first entitled to be served. For this reason the States, Wyoming and Colorado included, maintain systems of administrative supervision within their respective boundaries. Administrative officers themselves open and close the headgates of the different ditches, or else direct their opening and closing, with due regard to the quantity of water in the stream and the order of priorities. These same officers prevent appropriators from taking even the amounts called for by their respective appropriations to the extent that need for the water at the particular time may not exist, since all appropriators not actually needing the water at a given time must leave it in the stream to inure to the benefit of all other appropriators above or below in the order of their priorities. On an inter-

state stream the priorities early enough in the series to be actually served with water are interlaced, unless, indeed, it may happen that all of the worth-while priorities are in a single State. Where interlaced, priority No. 1 may be in one State, No. 2 in the other State, No. 3 back in the first State, and so on. Priorities in one of the States may be seriously affected by those in the other. Administrative supervision absolutely requires that all of the priorities belonging to a unified system be subjected to unified administrative control. It is a control that is not merely annual. It is weekly, indeed, daily, if the appropriators throughout the area of the unified system are to be protected. State administrative authorities will not suffice where the appropriation system is to be maintained regardless of State lines and where, therefore, the field of necessary administrative control is geographically larger than that of the State. The administrative officers of one State have no power within another. A priority in one State cannot be protected except by supervising, not only priorities generally within the same State, but also those within the other State upon the same stream. This neither State can do, and, therefore, priority regardless of State lines becomes an impossibility in point of administration.

On the other hand, under equitable division, the daily administrative control, so indispensable to the operation of an appropriation system, offers no problem at all. Each State is allowed an equitable portion of the water of the common stream, attaches to that portion its own appropriation system, and gives to the appropriations attached to that portion the daily administrative supervision which is so indispensable. All of this is done without the slightest injury

to the other State, since the appropriations in the latter State attach to a different portion of water altogether.

Upon the question of the relative merits of interstate priority and equitable division, it may be said that the States of the Union are not provinces. They are States. By the Federal Constitution they are accorded legislative, executive, and judicial departments, a large measure of local sovereignty and a body of local law. They have their respective peoples for whom to develop their natural resources. They are equal in rank and the right to opportunity, and are to be protected in that equality. The powers of the new States are identical with those of the original thirteen. Each State takes full notice of the rights and powers of each of the others. Each State, new and old, has jurisdiction of the streams within her borders, and the inherent right to consume an equitable part of the waters of her interstate streams. Wyoming and her citizens have made use of part of the waters of the Laramie river, with full notice of and subject to the right of Colorado and her citizens to make use of an equitable part of the waters of the Laramie river, even though such rightful use by Colorado might to some degree interfere with uses which have been established by Wyoming.

In *Kansas vs. Colorado* neither the doctrine of riparian rights nor of priority of appropriations was applied, but it was there held that one State may not unreasonably appropriate the waters of a river within its borders to the injury of another State through which such river flows, and in determining the question of reasonableness of the diversion of water by a State where the rights of another State are affected, the court will give due consideration to the interests of both States.

In other words, equitable apportionment of benefits was held to be the proper rule.

If regard be had by our common Constitution to State boundaries, when it comes to legislative, executive, and judicial departments and to bodies of law of the various States, why not in respect to the waters which flow from one State into another and upon which the peoples of both States are dependent? The rule of interstate priority or priority regardless of State lines violates these principles of equality. That of an equitable division does not. The first profits one State at the expense of another. The second does not. One is a rule of interstate discrimination; the other, of interstate justice.

CONCLUSION.

In view of the intricate problems in this case, which rise above questions of mere local private right and involve important matters of State interest affecting the general welfare and future progress of sovereign Commonwealths, we feel that we are not imposing upon this honorable court in asking that a rehearing be granted, and that the opinion rendered be vacated, modified or extended, or that the decree be changed in form so as to more justly and equitably cover the matters herein set forth.

Respectfully submitted,

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Solicitor and Counsel for the State of Colorado.
WILLIAM R. RAMSEY,
Assistant Attorney General,
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DELPH E. CARPENTER,
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JULIUS C. GUNTER,
Solicitor and Counsel for The Laramie-Poudre
Reservoirs and Irrigation Company.

L. WARD BANNISTER,
Of Counsel.

I hereby certify that the foregoing petition for rehearing is not filed for delay, and that in my judgment it should be granted.

VICTOR E. KEYES,
Attorney General,
Solicitor and of Counsel for the State of Colorado.

[Endorsed:] Supreme Court U. S., October Term, 1921. Term No. 3, Orig'l. State of Wyoming vs. State of Colorado. Petition for rehearing received August 4, 1922.

(6986)

IN THE

Supreme Court of the United States

No. 3, ORIGINAL

OCTOBER TERM, 1922

THE STATE OF WYOMING,
Complainant,

vs.

THE STATE OF COLORADO, THE GREELEY-POUDRE IRRIGATION DISTRICT, and THE LARAMIE POUDRE RESERVOIRS AND IRRIGATION COMPANY,
Defendants.

Application by Complainants for leave to file Brief in answer to the Motion and Brief by the Defendants for rehearing

---

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JOHN W. LACEY,
Of Counsel.

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Defendants.

Application by Complainants for leave to file Brief in answer to the Motion and Brief by the Defendants for rehearing

---

To the Honorable Judges of the Supreme Court of the United States:

The State of Wyoming respectfully moves the Court for leave to file a brief on its behalf in opposition to the application by the defendants for rehearing, and the brief of the defendants thereon, and complainant

now presents with this application the brief which it asks it be allowed to file.

Respectfully submitted,

THE STATE OF WYOMING,

By WILLIAM L. WALLS

Her Attorney General.

JOHN D. CLARK,
N. E. CORTHELL,
HERBERT V. LACEY,
JOHN W. LACEY,
Of Counsel.

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Defendants.

Brief for Complainants in answer to the Motion and Brief of the Defendants for rehearing

---

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IN THE

Supreme Court of the United States

IN EQUITY

THE STATE OF WYOMING,
Complainant,

vs.

THE STATE OF COLORADO, THE GREELEY-POUDRE IRRIGATION DISTRICT, and THE LARAMIE POUDRE RESERVOIRS AND IRRIGATION COMPANY,
Defendants.

Brief of the Complainant in opposition to the Petition for rehearing

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The State of Wyoming respectfully makes the suggestions herein in opposition to the petition for rehearing. In presenting the suggestions the complainant, well realizes the importance of the matters involved in the decision heretofore made in said cause and in the decree entered. The complainant is not unmindful of the fact that the State of Colorado is a defendant and that application has been made on behalf of the State of Utah to allow that State to intervene as a friend of the Court, nor does the complainant seek in the least to minimize the respect which should everywhere be given to the status and requests of one of the States of the Union.

It might not be amiss to suggest, however, that this cause was begun May 29, 1911, after leave of this Court had been obtained therefor. During the period of more than eleven years that intervened between the beginning of the cause and the final decision and decree the questions of law involved were first argued on a demurrer to the bill of complaint. After the answers were filed and the evidence taken the matter came on for hearing upon the merits before this Court. On three several occasions, with long intervals between, every question of law and fact was argued before this Court. At each of these separate arguments, this Court, largely because of the fact that the States were here contesting, and also to some extent in recognition of the importance of the issues involved, allowed to each of the parties liberal extensions of the time usually alloted for argument. The Court not only gave to the parties formal suggestions by the Court itself as to the questions that should be discussed on the second argument, and, of course, upon the third, but at each of the hearings, by interrogatories propounded by the members of the Court, informed the parties and their counsel very fully of the queries that the case raised in the mind of the Court and in the minds of its members.

During all of this time the State of Utah, which now seeks to come in as a friend of the Court, was entirely silent. On her appearance now it is not claimed by the State of Utah that any question of fact involved affects any interest of the State of Utah in the slightest degree, nor could such claim be made because all of the waters involved in this case arise many miles from Utah and do not anywhere touch that State, but, on the contrary, from the point of origin flow always in a direction away from that State.

It results that the State of Utah is interested solely, if at all, in some question of law which it believes has been settled by the decision of this Court.

The defendants here, in their petition for rehearing, acquiesce in every matter of fact found by the Court, save only the fact as to the priority of certain appropriations. The contentions of the defendants, outside that one question of fact, relate to three matters only.

I. The claim that the Court should not only have decreed as to the diversion of waters from the Laramie River through the Tunnel, mentioned in the bill of complaint and the evidence, to the Poudre River, but also should have taken up and decided the question whether or not Colorado should be permitted to continue to divert the waters of Sand Creek, as Colorado has been doing.

II. It is claimed that the costs should not be assessed against the State of Colorado, as was done.

III. It is claimed that the doctrine of prior appropriation should not have been applied here, but that the doctrine of "equitable apportionment," as defined in the case of Kansas v. Colorado, should have been applied.

We shall speak of these in the order in which they are treated by the petition for rehearing.

I. Should the Court have adjudicated Sand Creek.

It is difficult to see how the omission of the decree to settle the rights in Sand Creek, if indeed that be an omission, is matter for just complaint by the defendants. The bill makes no complaint against the defendants for any diversion of the Sand Creek waters.

The matter complained of in the bill is the threatened diversion through the Tunnel. It might therefore be difficult for the Court to find in the bill any ground alleged upon which it could make an adjudication as to Sand Creek. Had it been thought by the defendants that the rights to the use of water, as water was being used in Sand Creek, should be determined here, then that question should have been brought forward by answer, if indeed that would have been germane.

The petition for rehearing cites very meagre references to the use of the waters of Sand Creek, that are found in the record and in the defendants briefs. Inspection of the places as pointed out, will show that the Wilson Supply Ditch diverts water from Deadman Creek into Sand Creek; that a ditch known as the Divide Ditch diverts the waters of the Wilson Supply Ditch and Sand Creek into a tributary of the Poudre. (record, Vol. I, Fols. 1398-9, 1617). There is a hint in the record that there are contractual rights between the different parties along the stream as to these Sand Creek waters. (Fol. 901). The record clearly shows, as is pointed out in the opinion of this Court, that the waters of Sand Creek are all used along the stream, so that as a practical question it does not now empty any of its waters into the Laramie directly or indirectly. (record, Fols. 894-896).

It is submitted that under the state of the record above pointed out there was no requirement that the Court should attempt to determine the right of the several parties, or of the two States, as to the use that was being made of the waters of Sand Creek.

II. The questions of priorities of appropriations.

Point 2 in the Petition for Re-hearing questions the decision of the Court in assigning to the Laramie Poudre Tunnel Project a priority date as of October, 1909, rather than of August, 1902, or some intermediate date not very definitely specified but suggestive of 1904.

As pointed out in the Petition (pp. 3-4) the evidence was most exhaustively reviewed and quoted, and the defendant's arguments set out in much detail in their original brief (Vol. II, pp. 138-188), and in their supplemental brief (Vol. II, pp. 113-140).

The subject was discussed at some lengths by the plaintiff in its original brief (pp. 21-25), and more especially in the Supplemental brief (pp. 42-73). The opinion of the court (pp. 29-34) much more consicely, but with remarkable comprehensiveness and exactness, deals with this contention, reviews the evidence and analyzes the claim of priority.

The Petition for Rehearing accepts the governing rule, announced by the Court in the opinion, that a completed appropriation is effective "from the time the purpose to make it was definitely formed and actual work thereon was begun, provided the work was carried on to completion with reasonable diligence."

It would seem that the defendants throughout their discussion of this subject mistake the scope and import of this rule. It involves three essentials:

1. A purpose definitely formed;
2. The beginning of its actual physical execution;
3. Completion with reasonable diligence.

Definition of the "purpose" imports a settled intention to take

(a) A defined quantity of water,
(b) From a designated source,
(c) By predetermined means and methods,
(d) For application to a specific use.

The "Actual Work" required has reference to such extent, source, means, end, and not to random work which may or may not ultimately serve the purpose in whole or in part. "Reasonable diligence" in prosecution imports continuity of purpose and effort adequately conceived and executed with a speed and means proportionate to the magnitude of the project.

A general discussion of this question would be simply a repetition of what has been already exhaustively discussed on both sides in the briefs and in argument. The defendants now suggest that the date of the alleged priority may be fixed either as of 1902 or of 1904, rather than of 1909. Brief extracts from the testimony of Charles H. Hedke, the witness chiefly relied upon on this point, will demonstrate that the project was still in the formative, not to say nebulous, period after 1904. He testified that

> "In 1905 and 1906 we considered almost every piece of property on Cache La Poudre River in connection with this system, and surveys were made in these computations. Lines of distribution, water supplies, lands to be irrigated, and how the system could be used in connection with other systems for distribution were considered; necessary surveys from reservoirs and lands, several of which went as far as the Crow Creek country east of the Union Pacific Railroad. Other work was done in connection with system at upper end

taking into consideration group of reservoirs then belonging to The North Poudre Irrigation Company and its relation to this system.

"This involved surveys for the different reservoirs (F. 1751) and computations were made as to capacity and cost of incorporating them into general system. Also investigated possible supply from Big Thompson and Boyd Lakes, to ascerta n possibility of utilizing this water by exchange methods with Cache la Poudre Valley and its system. * * * * As another example of work that took place during years 1905 and 1906, the matter of diverting water from Laramie River watershed into Cache la Poudre watershed was considered and investigation was made as to other means of diverting this water outside of the tunnel then surveyed and contemplated. Investigation was made to divert the same water by means of canal and other works of similar character, around the watershed to the north, extending into Wyoming and across the divide between the Poudre and the Laramie at a point known as Fish Creek Divide, near Tie Siding, in Wyoming. (F. 1752).

"In 1905 and 1906 surveys were made in connection with general project to verify wisdom of building tunnel. Investigations of every possible means of diverting water were carried on. Laramie River Reservoir was surveyed in connection with survey for purpose of ascertaining feasibility of diversion of water from Laramie River drainage through the reservoir and an outlet canal from it in place of tunnel and collecting ditches. Had this plan been feasible we could have eliminated all construction of mountain ditches and tunnels. It would have resulted in construction of reservoir in channel of river, collecting all water above it and supplying it into a canal below. (F. 1759.) * * *

"In 1908 another investigation of this means of obtaining water and avoiding building tunnel

was carried on. In that year a complete survey was made and George C. Anderson of Denver, a consulting engineer, was taken over the entire line and a report made. (1761). * * *

"Several different tunnel sites were considered and their relations to the collecting ditch system. Different elevations of the collecting system, different lengths of tunnel, different means of regulating water into tunnel and such investigations and computations as were necessary to weigh and balance the various propositions and find the one most economical and best suited for conditions of development, were considered and surveys made to ascertain the facts." (1765).

Without further repetition of the history of the project as narrated by this and other witnesses it is evident that neither the purpose of the diversion, the means of its execution, nor its object became fixed or definite until the tentative contract of September, 1909, with the Greeley Poudre Irrigation District became definitive and binding in October of that year. It would be quite accurate to say that from 1902 to 1909 the 'purpose' of the promoters and the real object of their interest and efforts was to find the best physical means and to secure the necessary financial means for transferring as much water as practicable from a general region of supply to a general region of demand.

One circumstance selected and put forward by the defendants in their petition for rehearing as showing final adoption of the Tunnel project, and constituting prosecution of that work with actual construction may be mentioned. We refer to the ditch from the West Fork to the East Fork of the Laramie River near the Tunnel site. On this subject we believe substantially the whole of the testimony is comprehended in the following extracts:

ZAC T. DUVALL, a witness for the defendants, testified that

"In addition to locating the inlet ditch from the West Fork to the West Portal of the tunnel, I constructed about 500 or 600 feet of the canal from the creek and turned water in from the West Fork of the Laramie River June 10, 1904.

"That was the first actual excavation work on any part of the Laramie River system. Water ran through that portion of the inlet ditch which we constructed from the West Fork. (1885). * * *

"The west end of the tunnel has been somewhat lowered from the survey I made, but I do not know how much. *As now constructed, it is designed to take water from the level of the stream opposite the upper end, whereas my survey required an intake ditch to get the water into the tunnel, some of this ditch being built the year I was there.* Water was run through it, but no use whatever was made of it. I do not think it was completed, and I do not know whether it is now a part of the present system. I do not know that any work was done on it since 1904." (1900)

WALACE A. LINK, another witness for the defendants, testified that

"All necessary clearing was done from West Fork of Laramie River for ditch across the East Fork of Laramie River and to tunnel. Considerable of ditch line was plowed and some of it finished so as to turn water into it from West Fork of River. Ditch required considerable clearing of timber at this point. Work was done on floor of Laramie Valley nearly level with west portal of tunnel. Upper end of this clearing was a point lower in elevation than what is now known as West Side Collection Ditch. It was so con-

structed that water flowing through this latter ditch as well as from Upper Rawah, would be carried across and into tunnel. First clearing in any part of the project was on East Fork Reservoir and the next clearing was on this ditch line from West Fork to the tunnel. (1954).

"First work of construction following any surveys on this entire mountain system, exclusive of road work, was done on East Fork Reservoir and also on line of ditch leading from West Fork of Laramie River to west portal of tunnel. (1959). * * *

"The first work along any surveyed line was done on East Fork Reservoir and on ditch leading from West Fork of Laramie River to the tunnel. I mean work of excavation done on the ditch the survey of which had been located and cross-sectioned by engineer. (1960). * * *

"No considerable amount was expended on the Lower Rawah or the West Side ditches nor on the tunnel or reservoir, but about $1,300 or $1,400 was expended on the East Fork Reservoir." (1989)

JOHN R. WORTHAM, another witness for the defendants, who was the engineer for the Greeley Poudre Irrigation District, and who described the works at great length and in much detail, prepared the map designated as Exhibit 1, and attached to the Answer of the defendant corporations. Some eighteen months were devoted to the preparation of this map, which according to the testimony of witnesses exhibits fully and accurately the works and means of diversion and distribution connected with the project. (1635).

From Folio 1635 to Folio 1699 the witness describes the details of the project. Neither in this description nor in the map does any reference to the ditch from the West Fork to the East Fork appear. On the contrary the map shows, and this is corroborated by all

of the other evidence on the subject, that such ditch is not a part of the project but that the water is taken directly from the river into the tunnel by means of a reservoir intercepting the water in the river below the junction of the two Forks. The changes in plan and method described by several of the witnesses entirely eliminated from the project this work which seems to be relied upon by the defendants as constituting the beginning of actual work upon the consolidated and "composite" project. If this were not so, the cessation of work from June, 1904, to November, 1909, was hardly consistent with "diligent prosecution" of the construction.

All of these matters as to priorities were very thoroughly and carefully discussed in two separate sets of briefs filed in behalf of the complainant, and in two separate sets of briefs filed on behalf of the defendants. They were also discussed at length by both parties in the oral argument. In addition to that the Court, as disclosed in the opinion, went into these matters very exhaustively. We cannot see that the defendants have, in their petition for rehearing, pointed out any matter bearing upon these priorities that has failed of full and mature consideration by the Court. In addition to that, as we feel we have above indicated, the evidence, when taken altogether, would not lend itself to any other conclusion than that reached by the Court.

III. Is the decision of the Court as to costs erroneous?

By the third paragraph of their Petition for a Rehearing the defendants ask the Court to modify its judgment to the end that the costs shall be equally

divided between the two states. It is a well established rule in suits in equity that the allowance or disallowance of costs depends largely on the facts and circumstances of each particular case, and rests entirely within the discretion of the Court, to be exercised upon principle and with reference to the general rules of practice and as equity may require. Prima facie the prevailing party is entitled to costs and it is incumbent upon the losing party to show the existence of circumstances sufficient to overcome the prima facie claim of the prevailing party. The defendants recognizing this rule, and that the plaintiff prevailed upon the main issue in the case, ask this Court to modify its judgment as to costs upon the grounds; (1) that the Court declined to enjoin the defendants from diverting the waters of the Laramie River from its watershed to the Poudre River; (2) that the Court decreed the right to Colorado to divert not more than 15,500 acre feet annually, which division was allowed upon the specific ground that this number of acre feet was an appropriation prior in time to all Wyoming appropriations exceeding in amount 272,500 acre feet; and (3) that the Court held it was encumbent upon Wyoming to make reasonable and adequate provision for the storage of the highflow of the river flowing into Wyoming from the State of Colorado.

But these rulings of the Court are only incidental to the main case. The suit was brought by the State of Wyoming for the principal purpose of enjoining the defendants from diverting the waters of the Laramie River to the injury of the citizens of Wyoming who had made prior appropriations thereof. The Court found that after allowing the recognized Colorado senior appropriations aggregating 22,500 acre feet, 18,000 acre feet of which are for waters known as the

Skyline Ditch, and 4,250 acre feet for the irrigation of that number of acres of native hay meadows in the Laramie Valley in Colorado, the available supply of water is 288,000 acre feet. The Court further found that the Wyoming appropriations having priority over the Laramie-Poudre project in Colorado, and dependent upon the available supply of 288,000 acre feet, cover 181,500 acres of land, and that the amount of water appropriated and reasonably required for the irrigation of these lands is 272,500 acre feet; and there remained 15,500 acre feet subject to the junior appropriation of the corporation defendants in Colorado. The decree of the Court is in conformity with these findings, and taken together it is indubitable that the plaintiff prevailed upon all the main issues in this action.

The allowance to the Colorado appropriators of 15,500 acre feet was incidental only to the judgment of the Court that under the law of appropriation, upon which the case was decided, the Wyoming appropriators were entitled by right of seniority to appropriate 272,500 acre feet of the flow of the river without interference from the Laramie-Poudre project. Further, that the decision on the merits of the case was in favor of the plaintiff and against the defendants, is tactitly admitted, and even urged, in all the defendant's arguments for a rehearing.

This being the state of the record, the following principles and authorities are applicable to this branch of the case:

> It is familiar doctrine that the allowance of costs in equity rests in the sound discretion of the Court, and, while it is of course true that the prevailing party is prima facie entitled to costs, the unsuccessful party may show circumstances to overcome this presumption. When both parties are

partly wrong the Court may refuse to allow costs to either. On appeal from equity, an allowance of costs is generally treated as final unless a palpable abuse of judicial discretion is shown.

Blassengame vs. Boyd, 178 Fed. 1,
S. C. 101 C. C. A. 128.

The plaintiff was awarded full costs in the court below, notwithstanding that, in the report of the master and in the final decree, he was awarded only nominal damages. It is insisted that this was error but as costs in equity and admiralty cases are within the sound discretion of the Court, we do not feel inclined to disturb this decree in awarding full costs to the plaintiff.

Dubois vs. Kirk, 158 U. S., 58.

In actions at law it is a general rule, that the losing parties, or the parties against whom judgment is rendered, are to pay the costs; and no apportionment of the costs is made between them. Each is liable for all, whatever may be their respective interests in thesubject matter of the suit. In equity it is different. There the Court has a discretion as to the costs, and may impose them all upon one party, or may divide them in such manner as it sees fit. We see no error in this particular in the judgment rendered for all costs against the defendant.

Kittredge vs. Race, 92 U. S., 120.

The allowance of costs is a matter not positively limited by law in equity cases, but they are allowed in the exercise of a sound discretion of the Court.

Canter vs. Insurance Co., 3 Peters, 307.
Keller vs. Bading, 169 Ill., 152.
Pile vs. Pedrick, 167 Pa, St., 296.

In equity and in admiralty the taxation of costs, as between the parties, is a matter of sound legal discretion, and for this reason it is said that generally an appeal will not lie alone from a decree taxing costs.

In re Michigan Cent. R. Co. 124 Fed. 727.
S. C. 59 C. C. A. 643.
The Scotland, 118 U. S. 519.

In equity, costs are awarded in the discretion of the Court, to either party, as justice may require; but the litigant who succeeds in equity is prima facie entitled to his costs; and the one who fails must show affirmatively some reason why costs should not be allowed against him.

Saunders vs. Frost, 5 Pickering, 259.
Waters vs. Gooch, 6 J. J. Marsh, (Ky.) 152.

A complainant in a suit in equity who shows himself entitled to some relief, although only part of the relief sought, is entitled to recover costs.

Butler vs. Triplett, 1 Dana 152.

In an equitable action it is the province of the Court to determine upon whom costs shall fall; and the exercise of such discretion will not be interfered with unless abused.

McGregor vs. Fitzpatrick 133 Ga. 332.
65 S. E. 859.
Cicero Lumber Co. vs. Cicero, 176 Ill. 9.
Blue vs. Blue, 38 Ill. 9.
Walling vs. Kinnard, 10 Tex. 508.
60 Am. Dec., 216.

IV. The rule of prior appropriation applied by the Court, as contrasted with the so-called rule of "equitable division."

The fourth contention of the defendants, in their application for rehearing, raises the only question of law that is involved in their application. As here indicated that question of law is stated by the defendants, in their petition for rehearing, as follows:

> "In rendering its decision the Court failed to apply the doctrine of 'equitable apportionment' as defined in the case of Kansas v. Colorado.'
>
> See Application p. 9.

At another place in the Application the defendants state

> "It is laid down in Kansas v. Colorado that the proper rule to be applied in case of an interstate stream is that of equitable apportionment of benefits between states involved."
>
> (Petition, p. 11)

Again, the petition for rehearing used this language

> "If it can be that the degree of sovereignty possessed by a state is not sufficient to authorize the state to create in favor of its citizens water rights calling for all of the water contributed by the state to the interstate stream, then we wish to develop for the consideration of the Court the alternate rule of 'equitable division' laid down in Kansas v. Colorado."
>
> (Petition for rehearing, p. 12)

We shall not undertake to take up in detail the contentions of the defendants and their various argu-

ments upon what they assume to be some rule of "equitable division." We shall, however, later herein, take up what seems to us to be the rule as laid down in Kansas vs. Colorado, and attempt to show that the defendants would gain nothing, but rather lose by the application of that rule.

Various discussions as to the rule that should be applied on an interstate stream.

The first discussion in this case on the evidence and the merits occured in December 1916. In that discussion the defendants contended broadly, as was contended in the answers, that the State of Colorado had the right to seize all waters found within her borders, regardless of the rights of others, and, when pressed upon this point, sought to claim that there was some undefined rule which allowed Colorado and her corporations and citizens, to take from the interstate stream, while it was still within her borders, all of the water without being subject to answer to any one for so taking.

This Court, after that argument of December 1916, restored the case to the docket for reargument and entered an order in relation to that re-argument which contained the following provisions:

> 1. Counsel are requested to specially direct their attention to the rule which they deem should properly be applied to a solution of the controversy for decision: That is, whether the rights asserted are to be tested and determined solely by the application of the general principles of prior appropriation, without regard to state boundaries, or whether, on the contrary, the general principles of prior appropriation are sub-

ject to be restricted or their operation limited in this case by state lines, and if so, by what principles, under that assumption, the case is to be controlled.

2. They are moreover requested not merely by generalizations to state the facts relied upon, but specifically, by careful reference to the pages of the record, and to group them under the various propositions relied upon, including the extent of the use of water in both states when the work complained of was begun and when this suit was commenced, and the extent of appropriations made or authorized in either or both states since its commencement.

The second one of these provisions might well be considered when passing upon the questions of fact as to the relative priorities of appropriations, as it indicates clearly the purpose of the Court at that time to get from counsel on both sides all possible light from the evidence on the questions of priorities. We need only say here that counsel on both sides filed new briefs and digested the evidence in relation to this second request, and that the Court has all along given these questions very full and careful consideration and that the opinion in the case, as well as the Suggestion No. 2, reveals that careful consideration, and that there is no showing now that any different result would be reached on a reconsideration of those questions of priorities.

It will be noticed that the Court, in its request No. 1, as above quoted, asked counsel to give particular attention to the development of the "rule" which they deemed should properly be applied to a solution of the controversy for decision.

In response to this request of the Court counsel for the defendants filed elaborate briefs discussing the

rule, and citing authorities, and counsel for the complainant likewise filed their briefs upon the same matter of the rule that should be applied.

In other words, at this stage of the case, before the second argument on the evidence and the merits, the Court and counsel were bending every effort to the serious consideration of the question of the rule that should be applied.

Argument of 1918.

In January of 1918 this cause came on for the second argument upon the evidence and the merits, and this was after the filing of the supplemental briefs taking up the question of the rule that should be applied in response to the request of the Court made after the argument of 1916.

The earnestness of the Court in searching for the proper rule to be applied is manifest from the colloquies that occurred during the arguments of the case. For present purposes we will not lengthen this brief by reference to any colloquies or arguments there presented on behalf of the complainant, but confine ourselves to the matters occuring during the arguments made for the defendants. All of these arguments were taken down and transcribed. The following very interesting colloquies occurred during the arguments of counsel for the defendants at that argument in January, 1918.

From the argument of Mr. Rogers for the defendants.

> 'You asked for a rule. When you had the former argument, you asked for a rule by which to determine this. I know of no one who can furnish that rule out of hand. You may evolve

it after you have become familiar with all the conditions and the facts and circumstances which surround all the problems presented. It may be that you will evolve a rule. But for me, I have one rule, and that is the rule laid down by the Constitution, the laws and the decisions of the courts of Colorado; that Colorado, by virtue of her position, based not merely upon the fact that she is a sovereign state, but based upon economic laws, has a right to the use of all the waters of the streams flowing through that state necessary to the reclamation of her lands. The surrounding states have whatever comes down to those states, but with no right to inject themselves into the State of Colorado to say "You shall not use this water for your purposes, but must let it come down for our purposes."

Mr. Justice McKenna: Do you mean by that you can stop it all and use it all?

Mr. Rogers: If we could. I take the bold proposition, as stated by the laws—

Mr. Justice McKenna: (interposing) I am only asking the question to develop your thought,

Mr. Rogers: I do not want any mistaking my position in this case, because this Court asked me that question in the Kansas-Colorado case, and I give the same answer today, with more confidence than I gave it then, that there is only one practical rule, and I challenge anyone to suggest any other solution of the problem, that is, the state that by virtue of its position is enabled to, may use it to the extent of its necessities. That is a rule which has a common law basis. I do not mean to go into that phase of it now, but it has a common law basis, because if you want to apply the principles of the common law, which, to my mind, are not entirely applicable—although you can apply to the reason of the common law,—

the upper appropriator on the river uses the water to the extent that the common law permits. There are certain uses which are supposed to be reasonable uses, uses commensurate with necessities.

Then you pass to the next owner in order. There is a diminution of the water before it gets to the next owner, in order. He takes it, or whatever is left. He uses it according to his necessities, and then it passes on to the third, with the diminution that has taken place by the two upper appropriators, and he uses it according to his necessities. If it should occur, even under the common law doctrine, that the upper owners should use it all, the lower ones must suffer the consequences.

Mr. Justice McKenna: Suppose the lower owner is disposed to fight, as Mr. Carpenter indicated?

Mr. Rogers: Then he would break down the law. I am speaking about the law. You were speaking about force.

Mr. Justice McKenna: You made the observation, and based on it something of a rule as to what this Court ought to do.

Mr. Rogers: I am not going to tell this Court what it ought to do.

Mr. Justice McKenna: Maybe not what it ought to do, but what the Court in exercising its jurisdiction ought to do.

* * * * *

Mr. Rogers: Are you going to say, "Well, you may take up to a certain point and then let it go down to lower users." But up to what point? Who can say.

Mr. Justice Pitney: Your plan is to apply the doctrine that might makes right, that everything

they can do they may do? Is that your proposition?

Mr. Rogers: No. I do not like the introduction of the words that "might makes right." I would rather say that reason makes right.

Mr. Justice Day: The sovereign authority makes the right, as I understand it.

Mr. Rogers: The sovereign authority simply responds to a law of nature. And that is all there is in this whole doctrine of appropriation for beneficial uses. It is the necessary and absolute response. It is not an artificial creation. We do not take water for irrigation out of any mere matter that is put down in print. We take it because the Almighty has said to us "You cannot live on these barren lands unless you put water on them."

Mr. Justice McKenna: But he has said to us, "You are the first one that nature has favored with opportunity for using the water."

Mr. Justice Pitney: That is the might making the right.

Mr. Rogers: If you prefer to use that phrase "might making the right," you can apply that in all the relations of life. That is the reason that one man has a better position than another, because he has the power to get there."

From the argument of Mr. Farrar, for the defendants.

Mr. Justice Pitney: What I am trying to get at is this: If you are going to apply the law of appropriation, there must be some way irrespective of State adjudication for us to determine it. By what sort of principle are we going to get both States upon an equal footing if we are going to regard it from the standpoint of that appropriation?

Mr. Farrar: I can answer that only by saying it does not lend itself to that treatment; it cannot be done. The system of irrigation does not lend itself to academic treatment, to get down to a definite question. I am sorry I cannot answer your Honor more specifically.

From the argument of Mr. Carpenter.

Mr. Carpenter: It falls to my lot, Your Honors, to attempt, as best I can in my brief time, to speak to those questions propounded by the Court in the order for re-argument, with regard to the principle of prior appropriations, whether it is intrastate or interstate in its application; and if not interstate, what rule shall apply?

The Chief Justice: You really mean what rule shall be applied if the rule of prior appropriations is not applied?

Mr. Carpenter: Yes, Your Honor.

At the outset, for fear that time will too much limit me, I may state that it is our contention that the rule of prior appropriation, carrying, as it does, in each of the States of the arid West, unlike in its application in each thereof, is a rule of local law intrastate in its applications and is a rule of private property only. Also, that this rule of appropriation is not one of interstate law and that it is inapplicable to the settlement of all controversies between States.

In part, it may be said that this rule is not applicable between States for the reason that it violates the fundamental doctrine that each State of the Union has a right to depend upon her own resources for her growth and development, and cannot be hampered therein by servitudes and restrictions from without.

Mr. Justice Reynolds: I do not know what you mean by that.

Mr. Carpenter: I shall try to make it a little plainer as I proceed.

Second, that to apply the rule would be to leave the fate of each arid State and its destiny purely to the accident of first development.

Again, that to apply the rule to interstate controversies would be to impose upon one State, and the water and natural resources thereof, a perpetual servitude for the benefit of another State without the will or consent of the former.

Again, that the determination of prior appropriation, if applied without regard to State lines, would be inequitable and incapable of administration, for the various reasons which I shall attempt to assign.

Again, that the doctrine would be inapplicable because it would be impossible of administration.

And, finally, in each controversy, which must come before this Court, or before any tribunal, the facts must inevitably so vary, the conditions must be so dissimilar, and each controversy must stand upon its own set of facts, and no hard and fast rule can be made which will govern each and every controversy that must here be presented between States. At the outset, Your Honors—

The Chief Justice: (Interposing). I do not want to interrupt you, but as I understand you now, you do not propose to stop at destruction of the theory advanced in behalf of the other side, but when you get through destroying, you will build up some structure which you think should govern? You think there is no rule governing between States?

Mr. Carpenter: I think there is no hard and fast—

The Chief Justice: (Interposing.) When you say "hard and fast," I do not know what you mean.

Mr. Carpenter: No one rule. It is our contention that no one rule of law can apply to the

settlement of controversies between States over rivers.

The Chief Justice: Does that mean that no rule of law applies, or that there is a collection of rules that apply, and therefore there is some rule provided you can make that collection? I beg your pardon for interrupting.

Mr. Carpenter: There would be a collection of rules, to use your term, varying with each condition that is confronting the Court.

Mr. Justice Reynolds: No underlying principle upon which it can be determined? I cannot get any notion of your idea upon that point. I may understand it as you proceed.

Mr. Carpenter: Regarding the rule of priority, if I may go back a few minutes and trace this rule and its origin, it may aid us somewhat in following my argument.

I take it to be an elementary rule that this Government, made up of thirteen original States, was originally composed, if you please, of a Union of thirteen independent nations. Questions between nations, by the way, would be settled as international questions or one of policy. The union was formed, and new territory—

The Chief Justice: (Interposing.) That never was the case, you know.

Mr. Carpenter: I understand, but in the eyes of the law they were practically independent nations.

The Chief Justice: You state controversies between nations were settled by rule. That never was the case.

Mr. Carpenter: You mean in these United States?

The Chief Justice: Yes. When you speak of the thirteen original States, I am following you with reference to those States.

Mr. Carpenter: I meant that if they were independent nations, controversies over rivers would be settled as matters of policy and not necessarily of internation law.

These States took unto themselves a trust, in the North in the form of the Northwest territory, with the full understanding that that territory should be created into new States with exactly the same powers as the orginal, no greater and no less — not a grant of powers, but a stepping in of each State into its place in the Union, complete, clothed with all the powers of the original States.

* * * * *

So as between these States, they can still treat, or they may still treat, permission having been obtained, as Mexico and the United States treated, and their matters be settled as matters of interstate policy, governed by the conditions which confront each commission appointed and sitting for the purpose of arriving at that treaty.

Mr. Justice Day: Suppose you could not arbitrate in that way?

Mr. Carpenter: Then they must come here.

Mr. Justice Day: You must come to what they came to under the confederation or to the shedding of blood.

Mr. Carpenter: Yes, sir — but we could not do that. We would have to come here.

Mr. Justice Holmes: I do not understand you are denying the jurisdiction of this Court to decide these cases?

Mr. Carpenter: Not at all.

Mr. Justice Holmes: But the wisest way of doing this would be in the first place, to make a treaty, subject always to ultimately coming here.

The Chief Justice: I understood the contention to be that this is not a subject matter of judicial action.

Mr. Carpenter: Oh, I beg your pardon, no, no.

The Chief Justice: I do not see how it could be the subject of judicial action, if, under your statement, the right of each State is supreme to do it within its own borders, and that others cannot interfere.

Mr. Carpenter: Undoubtedly, Your Honor, this Court sits and has jurisdiction in these cases as would a Court of International Arbitration between nations —

The Chief Justice: (Interposing.) I do not agree with you.

Mr. Carpenter: (Continuing.) —which nations in turn had agreed to surrender to that Court the power of adjusting their differences and had surrendered the right to go to war.

The Chief Justice: I cannot agree that this Court is an arbitrator, because that would not be a judicial power. That would be excluding the judicial power.

Mr. Carpenter: I said assuming that a Court of International Law had power to enforce its decrees.

Mr. Justice McKenna: Of course, if the respective States have rights which should be considered between themselves, neither one could have absolutely a rule which should be applicable to the other. There must be some principle to determine these matters.

Mr. Carpenter: The contention that would be presented tomorrow in another case would involve conditions very materially different, probably, from those presented by us today.

Mr. Justice Brandeis: Is there any significance to be given to the fact that both of these States have been carved out of territory which belonged to the United States?

Mr. Carpenter: None, as I take it, Your Honor, at all, because each of these States came into the Union on an exact equality with Maine, Massachusetts, New Jersey, or any of the original States.

Mr. Justice Brandeis: If you drive that principle of exact equality, which I supposed related to political power and not to property rights primarily, you would be confronted with the fact that in all the thirteen States your rule of riparian ownership applied.

Mr. Carpenter: Yes.

Mr. Justice Brandeis: I do not know but what you would be worse off under that rule than you would under the rule of priority.

Mr. Carpenter: That was the rule of local law, and if your Honor recalls, the Courts of those States have decided that the easements in the streams created by those rights have no extra-territorial operation except by consent. It was decided in Massachusetts by the Supreme Court, if I recall, that it would have to be assumed that the upper State consented before an easement upon this stream could be impressed and enforced in behalf of a riparian owner in a lower State.

Mr. Justice Brandeis: And what was the ultimate decision?

Mr. Carpenter: I do not now recall.

Mr. Justice Reynolds: Let us consider this case: The Tennessee River flows clear across Tennessee and then clear across the State of Kentucky. Under that rule, could the State of Tennessee turn that around and cut it away from the Mississippi River and cut it off entirely, if they wished to, in that way?

Mr. Carpenter: I would say, academically speaking, yes, but —

Mr. Justice McReynolds. (Interposing.) Whether that is the principle that you are advocating here, is what I would like to get at, if I can.

Mr. Carpenter: No, Your Honor, that is not the principle we are advocating — that is, in this, that so far as this case is concerned, we insist no condition has here arisen which can compel an application of any rule, because the plaintiff has not brought us to that extreme position, if you please, where, as if it were between nations, we would either have to go to war or settle. In an illustration which Your Honor uses, if the diversion of that river were to totally devastate the State below, while each of those States undoubtedly has complete dominion of property within its borders, save for navigation and other governmental functions —

Mr. Justice Holmes: (Interposing.) I do not understand that you are not bothering very much about what might be the extreme limit if you were pressed to the extreme, but saying that, so far as this case is concerned, a reasonable distribution between the two would not be reached by adopting a simple principle of priority, but some other principle must be reached, and I suppose you are content to have some principle of division arrived at short of an absolute saying that Colorado may do what she chooses?

Mr. Carpenter: Absolutely. We come here of course as litigant States recognizing the right of the other to exist but we do not believe that we have pressed them to the point of the extreme right.

Mr. Justice Day: Just what do you mean by that? Colorado is within her rights, you contend?

Mr. Carpenter: Yes.

Mr. Justice Day: Looking at it from what standpoint — obligation or right or what?

Mr. Carpenter: Colorado has made this appropriation of her natural elements within her right, and is using it for her benefit and those of her people, and in so doing has not gone so far as to destroy her neighbor, which would be the extreme case.

Mr. Justice Pitney: Do you recognize no duty on the part of Colorado to so enjoy her own natural resources as to not injure her neighbor?

Mr. Carpenter: I would not say so as not to injure. Some injury must result necessarily. But use so as not to unreasonably injure her neighbor.

Mr. Justice Brandeis: Do you mean, there not being enough for both, there must be a fair division, considering the water which is also available to Wyoming from other sources — I mean in this valley?

Mr. Carpenter: Do you mean as far as this particular case is concerned?

Mr. Justice Brandeis: That is the only case that is before us.

Mr. Carpenter: I do not think it has arrived at the point of a fair division. I feel that the small part of our own water that we are taking is so small compared with the sum total of this river, a large part of which we contribute to Wyoming, that we are not driven to the point of a division at all.

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Mr. Justice Day: You say the other theory will not work. Those who have the duty of deciding the case must have some theory for it. What rule would you lay down to guide the Court in determining a matter of this kind?

Mr. Carpenter: I would say this, as I said at the outset, that no rule can be announced definitely that must determine every case; but I would say in this case, Your Honor, the evidence fails to show that Colorado, in the use of her natural resources within her borders, has unreasonably or unduly, in that exercise of her sovereign right, invaded or injured the neighboring State.

Mr. Justice Day: That is nothing more than saying she took her portion of the water in a common river.

Mr. Carpenter: Yes.

The Chief Justice: I am not, of course, expressing any opinion about what ought to be applied in this case, because I do not know, but there is a duty on me to apply something.

Mr. Carpenter: Certainly.

The Chief Justice: I do not agree with your premise that there ever was a time in the history of this country where the states, to use your word "sovereign," had the power which you assume they had. I do not think they ever had it. They did not have it in colonial times. They did not have it under the confederation, and the Constitution put in a provision which took it away from them under the Constitution by making certain questions judicial questions. There are of course some cases in Colonial times where there were differences between these States, and the Privy Council acted and determined what were their rights, and involving things more intimate than this water. In the Confederation they put an express article, in the Articles of Confederation, providing for suits and how they should be determined. When they came to create the Constitution of the United States, they put in the judicial power. I do not see your premise of sovereignty. The right of a sovereign may be

the criterion by which, under the power conveyed, we have to determine a question. I am not saying it is not; I do not know. I am looking for light on that subject. But I am combatting any proposition which holds that the sovereign right gives them power to do something which is incompatible with the rights of the other under the law which governs the relations of sovereigns as between themselves; because I think the colonies and the Confederation and the Constitution of the United States have provided for action on those subjects; I cannot follow you in the premise you offer, — as I think you offer it. I may be entirely mistaken. I am not saying that Colorado ought not to have all the water. I am not expressing any opinion on that.

Mr. Carpenter: I understand, Your Honor.

Naturally I have been following in my statement, probably unconsciously, the language of the decisions of this Court in the many cases which we have cited in the briefs as to the attribute rights of States, their sovereign rights, and their relations one with another.

* * * * *

Mr. Justice Pitney: What weight do you give to the circumstance that the general principle of prior appropriation of water, irrespective of administering the right, was adopted by common consent in that arid country, obtaining in each of the States, and adopted because by common consent, it was deemed that it would best contribute to build up the country and the States according to the rights of the States and of the parties that went there to make American communities there and to build them up?

Mr. Carpenter: Does Your Honor mean by common consent of the States themselves?

Mr. Justice Pitney: Of course, they made the rule of conduct, the rule of life, the rule of principle, themselves.

Mr. Carpenter: Yes, the people within each State made the rule.

Mr. Justice Pitney: The States agreed one with the other.

Mr. Carpenter: Oh, no sir.

Mr. Justice Pitney: Didn't they, in general principle? Didn't they agree on general principle how it shall be administered?

Mr. Carpenter: No sir, they varied.

Mr. Justice Pitney: In what respect?

Mr. Carpenter: Along the border States of California, and Oregon, and Washington, both rules of riparian rights and appropriations obtained. In Nebraska, partly an arid State and partly a humid State, both rights obtained, and in Kansas the same. Colorado is wholly arid, but she adjoins Nebraska and she adjoins Kansas. There is no common consent and the rule is not commonly adopted by consent among the States acting together.

Mr. Justice Day: Is not Wyoming an arid State?

Mr. Carpenter: Yes.

Mr. Justice Day: And Colorado the same?

Mr. Carpenter: Yes.

Mr. Justice Day: Are not their systems of distribution practically the same?

Mr. Carpenter: No sir, they are not.

Mrs. Justice Day: Radically different?

Mr. Carpenter: I probably speak too hastily. In general, they are the same, they vary greatly in detail.

Mr. Justice Pitney: When were these early acts of Congress passed with reference to this question?

Mr. Carpenter: The acts of 1866 and the acts of 1870 were both enacted before Colorado was admitted to the Union. But those acts apply to local divisions and to local law.—

Mr. Justice Pitney: What effect the local laws have is another question. The two States virtually have been brought up from the beginning under the principle of appropriation.

* * * * *

Mr. Carpenter: To attempt to apply this doctrine between two States, would mean, as for example here, that Wyoming would say, "We have already appropriated this river." Assume, for the purpose of argument, that her prior appropriations, when all were drawing at their maximum, were adequate, or were of such magnitude, that they would consume the river. That does not mean that that condition obtains constantly. That is merely the maximum, and there are times, not very many, when right in the midst of the summer or at other seasons when the demand is so little because the necessity is so great, that water would go wasting. So even if she did have prior appropriation and this were to be decided on the question of priority, the rights between the parties would simply be these — the right of upper tunnel to divert only when there was no necessity upon the part of the prior appropriations below, and what the necessity would be is a question of fact to be determined every hour of the day, and cannot be determined by any given fixed quantity. On the other hand, were that not true, the necessities not existing for the older appropriations in Wyoming, if the upper were forced to pass the water down, then it would be taken by these junior to the upper project, because the water which has once passed the upper is gone forever.

So that in order to balance up, or rather in order to administer priority regardless of State

lines, would require not only the general uniform policing responsive to a common source and responsive to the immediate demands and injuries of the local parties, but more than that, must operate under one system of law throughout.

* * * * *

From the argument of Mr. Solicitor General Davis in 1918, on behalf of the Government, the following matters are taken:

> Mr. Solicitor General Davis: If Colorado came into the union taking title to these innavigable waters, she took what none of the States of the original sisterhood ever hoped or pretended to enjoy; so that, so far from that doctrine producing equality, it produces upon its face inequality of the most transparent sort.
>
> As I say, the United States is not concerned in the particular outcome of this controversy. If this rule were applied to the instant case, we are not prepared to say what the result would be. We are not prepared to say whether Wyoming is suffering from this action of Colorado, whether this water which Colorado proposes to divert may be taken without burdening the citizens of Wyoming. All we say is this, that all rights on this Laramie River from its source in the mountains to its mouth on the Platte are still acquired from the United States. That they are entitled to respect in the order of their acquisition; although that acquisition may have been procured or conducted in conformity with State law by State filings or State license or what not, yet as to that the State was simply functioning as an agent of the Federal Government; that having so taken their rights from this common source, they are to be respected in the order in which they were taken and in which they vested. If it shall appear from the evidence that rights so vested in Wyoming

before this diversion was attempted in Colorado will be injured by the diversion, the diversion to that extent should be enjoined. If those senior rights will not be so injured, then, under the rule which we propose, the bill would be dismissed.

Mr. Justice McReynolds: How would you work out that rule practically to apply to this case?

Mr. Davis: That is a question I just now undertook to answer.

Mr. Justice McReynolds: How shall we ascertain whether they are injured?

Mr. Davis: That is simply a question of evidence, of course. That is to be determined by ascertaining the flow of the stream, by ascertaining the extent of the original appropriation. Here we have A. in Wyoming. "What have you?" "I have an appropriation right." "When?" "We have this date." "How much?" "We have this quantity." And so on with B., C., D., and E.

The next argument on the evidence and the merits took place in January 1922, and the care and attention that the Court was still giving to the question here sought to be raised anew, is illustrated by colloquies occuring between the members of the Court and counsel discussing the questions involved on behalf of the defendants at that hearing.

These colloquies upon this matter in 1922 were as follows:

From the argument of Mr. Keyes, Attorney General of the State of Colorado.

Mr. Justice Pitney: When was Colorado admitted as a State?

Mr. Keyes: In 1876.

Mr. Justice Pitney: What effect do you think the Act of Congress passed about ten years earlier with respect to public lands has upon it?

Mr. Keyes: We do not think that would have any effect upon it, because we think that Colorado was admitted into the Union upon the same basis as all the other States, and that the waters of the streams became State property when we were admitted.

Mr. Justice Pitney: How do you maintain that the waters of all other States were for the use only of the State in which they arose? I do not understand that that is the law of the land.

Mr. Keyes: Yes; I think there are numerous cases holding that the waters of a State, at least so far as intrastate streams are concerned, are the waters of the State itself and can be used by the State as it pleases.

Mr. Justice Pitney: I thought I had heard and seen cases in State Courts, both the State and Federal Courts, where the case as between upper and lower owners related to water that crossed the boundary, and where the law of appropriation was applied without any regard to any State line.

Mr. Keyes: There are no cases, so far as I am aware, in which there has been a controversy between two sovereign States.

Mr. Justice Pitney: Of course not. The question is, how do you get the sovereign State superior to the law of the land? That is what I am inquiring about.

Mr. Keyes: In the two or three cases that have been decided in the courts, the court has expressly said and expressly intimated that a question might be involved as to the state itself. We claim that Colorado is a sovereign State, that the waters of its natural streams belong to it, the same as the waters of the natural streams of

the original thirteen States; that we have control and jurisdiction of the waters of the streams. In one or two cases in connection with upper and lower appropriations, where it was assumed that the States were willlng, I think they have applied that, but they have expressly said that where the State itself was a party, and here in Colorado, according to our constitution itself, the waters of our natural streams belong to the State, the same as if were admitted into the Union with the original thirteen States.

Mr. Justice McReynolds. What is the rule in your State as to how waters shall be appropriated as between the various takers? One man takes it in the year 1900, another in 1901 and another in 1902. Under your rule how would that water be appropriated in seasons of scarcity?

Mr. Keyes: It would go, in seasons of scarcity, so far as intrastate matters are concerned, to the prior appropriator.

Mr. Justice McReynolds: You are not willing to apply that rule to your neighbor?

Mr. Keyes: No, we think that does not apply between States.

Mr. Justice McReynolds: Why?

Mr. Keyes: There are many reasons. The first is that we claim that the rule between sovereign States is an entirely different rule than should be applied between individuals; that the sovereign State being a party has a right to use its waters so long as it at least does not unreasonably exercise its sovereignty. For instance, in the Kansas-Colorado case it was said, can we not assume that in using these waters Colorado has not unreasonably exercised its sovereignty?

We think an entirely different position should apply where the State itself is a party. I think there always has been that distinction and that difference.

From the argument of Mr. Carpenter.

Mr. Justice Day: You mean to treat the States as independent sovereigns, just as independent nations would be?

Mr. Carpenter: For the purpose of these disputes, that is our position.

Mr. Justice McKenna: Do you assign to the State which is the source of the river all the river, notwithstanding all its accumulation in volume during its course?

Mr. Carpenter: Technically speaking, Your Honor, if we were to apply the rule of international law the State would be entitled to the absolute dominion and use of the entire river.

Mr. Justice McKenna: That is, according to the authorities you have quoted.

Mr. Carpenter: Yes, sir. But there, as here, it becomes one of policy, first, between the States, which may, and should be, as some of us believe, settled amicably between those States by interstate compact, consent of Congress having been obtained, or their subsequent approval; and failing in this, then if we were to consume the entire stream, and utterly devastate a country, which would, if you please, be a sufficient cause for war under the law of nations, then we are brought to the bar of this Court, and then the question in any case of this kind, we contend, is not what use have the private citizens made, but rather, has the upper State, under all the facts of the case, including all the conditions, present and prospective, after all, unreasonably exercised her sovereignty? * * *

The Chief Justice: How far does that help you? You have still got the standard of unreasonable use and sovereignty. What is it?

Mr. Carpenter: Certainly it is a question of fact.

The Chief Justice: It is a question of fact?

Mr. Carpenter: It is a question of fact, to depend entirely upon the facts of each particular river under consideration. Conditions might vary greatly. Conditions on one river might be the direct contrast of conditions upon another river. Conditions upon a river in one section of the country might be the direct contrast of conditions upon a river in another section of the United States.

Second, conditions of local law vary with each State. I know of no two States, I am free to say, in the Union — I should say in the West, of the appropriation States, so-called, for example, whose laws are identical or whose methods of handling and controlling the streams are the same. Each condition calls for its own rule.

The Chief Justice: Then, you leave it to the arbitrary discretion of the tribunal that has to act on it?

Mr. Carpenter: I would not say "arbitrary". I would say "judicial" discretion of a tribunal.

The Chief Justice: It is based on some rule, is it not?

Mr. Carpenter: There is no rule. You cannot, frankly — and I do not say this to be impertinent — but I really feel there is no set rule, and can be no set rule, except that which I have stated, that it is a question of interest between States, has the upper State, in view of all the facts of the particular case presented, unreasonably exercised its sovereignty? I think this question of the unreasonable exercise is one of fact.

Mr. Justice McKenna: When you say there is no set rule, do you mean that as a declaration of principle as to appropriation or riparian rights, or something or other?

Mr. Carpenter: I most certainly do. I most certainly contend, your Honor, that neither the rule of priority of appropriations nor the rule of riparian rights has any place in the final determination of rights between States.

Mr. Justice McKenna: What other rule would you make?

Mr. Carpenter: I would make this, and this is the only rule, it seems, could be applied.

The Chief Justice: That is not any rule at all, is it?

Mr. Carpenter: You applied it in the case of Kansas vs. Colorado, and, as I understand, that is the decision of that case. A similar rule is likewise, as we understand, applied in the case of Missouri vs. Illinois.

The Chief Justice: In one of those cases — it may have been the Kansas case — there was the statement that what this Court ought to do is to build up an interstate common law. That seems a laying down of principles, does it not?

Mr. Carpenter: Yes; but, your Honor, you certainly would not wish, if I might answer indirectly, to lay down a principle of law, that could not apply all over the country.

The Chief Justice: That is a different proposition.

Mr. Carpenter: And the conditions of local law vary with local conditions.

Mr. Justice Holmes: This seems to be rather a dispute about words. Of course, the principle, whatever it is, would be a principle of law. The scope of it will be determined as successive decisions gradually work it out.

Mr. Carpenter: Yes, sir; it is a matter of evolution entirely, as internation law has been a matter of evolution.

The Chief Justice: But there must be some principles about it, and some rules.

Mr. Carpenter: Yes.

The Chief Justice: I understand you to say there are no rules.

Mr. Carpenter: Of international law.

The Chief Justice: No, but I mean here.

Mr. Carpenter: I did not mean that. No, there is no yard stick rule, in that sense. There is no definite rule like priority of appropriations, which is a rule of accident, largely, and a rule of contest of speed. There is no such thing as the lower nation wholly depriving an upper nation of the use of waters of the streams because of riparian right principles. These details of local law may justly enter into a consideration of the broader facts surrounding an interstate river.

The Chief Justice: Can they not form the basis of an analogous rule?

Mr. Carpenter: They may if that analogous rule could apply.

The Chief Justice: If you could qualify it to meet the change in the genral situation?

Mr. Carpenter: Yes, if you could, your Honor; but frankly, hardly two rivers of the country can be governed by the same rule.

Mr. Justice Brandeis: Is not reasonable use a rule, just as well as reasonable care is a rule?

Mr. Carpenter: That is as we take it.

Mr. Justice Brandeis: And that is not a matter of discretion. A Court, in passing upon whether a person has exercised reasonable care or made a reasonable use of an article, is not exercising discretion at all. It is applying a rule.

Mr. Carpenter: That is true.

Mr. Justice Holmes: And, in the case of reasonable care, successive decisions withdraw successive cases from the vague inquiry, and make them more and more specific. It gradually renders itself definite.

The Chief Justice: Until you get a standard.

Mr. Carpenter: Until you finally get a standard.

The Chief Justice: Until you finally get a rule.

Mr. Carpenter: Finally. But our interstate water law, if I may state it, is in the formative stages, ultimately, we hope, leading to some rule.

Mr. Justice McKenna: But you have to deal with the present. How long would you have to wait for the evolution of the rule? We cannot leave it to future generations, to see what they are going to do about this situation. We have got to deal with it now.

We do not see how it would be possible for this Court more sharply to call the attention of counsel to the question now sought to be raised as to the applicable rule than was done by this Court in the instant case. We do not see how it would be possible for the Court to strive more earnestly to find every possible suggestion and reason from the learning and diligence of the eminent counsel who represented the defendants than was done, and were this all we think it would fully answer the application for a rehearing. The defendants have already given to the Court, at its earnest request and upon its earnest insistence every possible aid that they have been able to give the Court upon this direct question of the rule that should be applied. There was no omission by the Court to study this question; there was no failure of the Court in giving

its attention to it; there was no oversight. The question here was not in the least lost sight of, but it was present very pronimently through all of the discussions of the Court, and, being so present, was given very careful attention at the final hearing. These matters alone are held perhaps universally sufficient reason for denying rehearing in any case on any matter so thoroughly considered.

The rule of "equitable division" as applied in the case of Kansas v. Colorado, would not aid the defendants.

To us it seems entirely clear that the defendants have mistaken the point decided in the case of Kansas vs. Colorado. In that case there was no question of diversion beyond the water-shed. All of the lands involved were riparian lands. The State of Colorado, in its answer, and even more fully in its briefs in that case, took pains to point out specifically the fact that the lands involved in Colorado, as well as those involved in Kansas, were riparian lands. This was in answer to a single charge in the bill of complaint that the waters diverted were "actually applied to these dry, barren, arid, non-riparian and non-saturated lands in the State of Colorado."

Questions of prior appropriation were sought to be introduced in the case. In fact, they were not much considered in the case, and the question was negatively decided against Kansas on the principles of riparian rights. We shall show later what we mean by "negatively."

The State of Kansas, in that case, in fact based its contentions upon the doctrine of *riparion rights* This Court finally declined to lay down any definite rule

that should apply to interstate streams in all cases. The Court found instead a solution of the controversy then before the Court in the very doctrine of riparian rights which was being urged by the State of Kansas as the just doctrine. In considering this doctrine of riparian rights, which the State of Kansas has held and was holding to be a just and equitable rule governing the rights of riparian proprietors on a stream, this Court found that it was not true in Kansas, not true under the rule which that State administered, that the waters of a stream must be left to flow down in full and undiminished volume to each lower proprietor. On the contrary the State of Kansas held it just that under the doctrine of riparian rights "a portion of the water of a stream may be used for the purpose of irrigating land * * * yet a proprietor cannot under color of that right, or for the purpose of irrigating his own land, wholly obstruct or divert the watercourse or take such an unreasonable quantity of water, or make such unreasonable use of it as to deprive other proprietors of the substantial benefits which they might derive from it if not diverted or used unreasonably." This Kansas doctrine was taken from the case of Clark vs. Allaman, 71 Kan. 206, and large quotations were made by this Court in the Kansas-Colorado case from that Kansas case. Moreover, the Kansas case of Clark vs. Allaman itself quoted similar observations from the opinion of Chief Justice Shaw in the case of Elliott vs. Pittsburgh Railroad Co. 10 Cush. 191, 193, 196. Among the words quoted from Chief Justice Shaw by the Kansas case are the following:

> The right of flowing water is now well settled to be a right incident to property in the land. It is a right *publici juris* of such a character that whilst it is common and equal to all through

> whose land it runs, and none can abstract or divert it, yet, as one of the beneficial gifts of providence, each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down.

This Court then, in discussing the evidence, found that Colorado was a riparian proprietor, that the lands on which it used the waters of the upper river were riparian lands, that under the circumstances Kansas could not enforce against Colorado a rule of riparian rights stronger than the rule which she herself laid down as just in contests between her own citizens; she could not be heard to claim that the rule of "equitable division" between riparian proprietors was an unjust rule. The Court upon that point uses this language:

> As Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an equitable division between the *riparian* proprietors, she cannot complain if the same rule is administered between herself and a sister state. (Italics ours)
>
> (206 U. S. 104)

In other words, the very doctrine which Kansas laid down as just, was applied in her own case. The Supreme Court in fact say to Kansas,

> You cannot, in this Court, insist that the just doctrine in ascertaining rights between riparian proprietors, when those proprietors are states, is stronger in your favor than the doctrine which you have established as just between your citizens who are riparian proprietors.

Thus it is that in that case the Court did not affirmatively establish any rule as between neighboring states — at least no rule of general application. But it did, by negation, deny to Kansas rights greater than those which she established as just, between her citizens, and said as to Kansas, "she cannot complain if the same rule is administered between herself and a sister state."

The rule of "equitable division," therefore, as applied, not positively, it is true, but negatively, as we have indicated in the case of Kansas v. Colorado, is not a rule which permits *non-riparian* proprietors to divert the waters of a stream to *non-riparian* lands. It is merely the doctrine of the rights of riparian proprietors, and defines those rights as they are defined in Massachusetts and Kansas and certain others of the states.

This Court did not find or apply in the Kansas case any *new rule* for dividing waters between States either equitable or otherwise—did not hint that rights between States were to be determined by any different rule from that applied between individual neighbors.

Before the defendants can appeal to the doctrine of "equitable division," as applied in the Kansas case, therefore, they must confine their use of the waters to *riparian* lands.

No lengthy discussion is needed, nor lengthy citation of authorities, to show that the defendants under any doctrine of riparian right would not be allowed to take even the 15,500 acre feet which the decree permits, and divert the same through the tunnel into the water-shed of the Poudre, where no part of the waters can ever return to the Laramie River. A single quotation will suffice:

> As we have seen in a previous portion of this work, lands, in order to be riparian, must border

or touch upon the water of a stream or other body of water. In other words, the riparian owner must own the bank in order for his lands to be riparian. This principle is also adhered to in the Western States which follow the common law and allow a liberal use of the waters of the natural streams for irrigation. The question now arises, as to how far back from the stream the lands may lie, so that they may be irrigated as a riparian right, under the Western American construction of the common law. Upon this subject the States in question have adopted practically the same rule. For the present we will disregard the question of title, and discuss the question from the standpoint of the watershed. The great weight of authority in these States holds that land in order to be riparian, and hence entitled to be irrigated as a riparian right, should lie within the drainage basin or watershed of the stream to which the riparian rights are claimed. This is so for the reason that, as soon as the land passed over the ridge or "divide" separating its drainage basin from another, it became tributary to another stream; and, therefore, if it touches this stream, it is riparian to it; if it touches no stream, it is not riparian land. So, if a divide cuts in two a tract of land held under one ownership, that portion only which lies within the drainage basin of the stream may rightfully be irrigated.

If we are to adhere to the principles of the common law, this rule is undoubtedly the correct one. We have seen in previous sections, that the use of the water for irrigation must be a reasonable one. We will also see in a subsequent section that after its use all water not actually consumed must be returned to the natural stream, for a like use by the other riparian proprietors below. Now to run the water by means of tunnels, or otherwise, under the divide to another watershed, so that both the percolation and the surplus could not be returned to the stream from which it was

taken, but would flow to another stream, would be a most unreasonable use of the water, when taking into consideration the rights of the other proprietors on the first stream, and would also give to the proprietors on the second stream water to which they were not entitled.

(Kinney on Water Rights, 2nd Ed., Vol. I, p. 892, Sec. 514)

We submit,

1st. The Court, under the pleadings, and the evidence, was not called upon to enjoin the diversion of Sand Creek, and there was nothing in the case which required the Court to say that such a diversion could not be enjoined.

2nd. The facts as to the priorities of the diversions by the complainant, as compared with those by the defendants, were fully—even exhaustively considered by this Court, and its conclusions are fully sustained by the evidence, and that evidence, when taken altogether, would not have supported any other finding than that made.

3rd. The Court's decision as to the question of costs was not only within the discretion of the Court, but was a proper disposition of the matter of costs.

4th. The question of law sought to be raised as to the rule that should apply here between two states, both administering the doctrine of prior appropriations,

(a) Was fully discussed by counsel both in briefs and on the oral argument;

(b) Was fully and carefully considered by the Court for several years;

(c) Has always been held to be the only just doctrine by both the States here involved;

(d) No other rule is suggested by the defendants save the Kansas-Colorado rule, which would not give defendants more water, but would take away the 15,500 acre feet allowed by the decree;

(e) The rule adopted, in view of the statutes of the United States of 1866, and following, when both states were a single arid tract, possessed by the United States and not even separated into territories, and in view of the decisions of both states as to what is just and right between man and man, is the only reasonable rule that can be adopted.

Moreover this Court could not hope to give to the question of the applicable rule more careful and exhaustive attention and consideration than that which resulted in the decision which has been rendered.

Respectfully submitted,

THE STATE OF WYOMING,

By WILLIAM L. WALLS

Her Attorney General.

JOHN D. CLARK,
N. E. CORTHELL,
HERBERT V. LACEY,
JOHN W. LACEY,
Of Counsel.

FILE COPY

In the Supreme Court of the United States

October Term ~~1922~~ 1921

THE STATE OF WYOMING,
Complainant,
vs.
THE STATE OF COLORADO, THE GREELEY POUDRE IRRIGATION DISTRICT and THE LARAMIE RESERVOIRS AND IRRIGATION COMPANY,
Defendants.

3. Dig

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN RE PETITION FOR REHEARING.

HARVEY H. CLUFF,
Attorney General of Utah,
WILLIAM A. HILTON,
Assistant Attorney General of Utah,
Solicitors and Counsel for the State of Utah.

In the Supreme Court of the United States

NO. 3 ORIGINAL

October Term 1922

THE STATE OF WYOMING,
Complainant,

vs.

THE STATE OF COLORADO,
et al,
Defendants.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN RE PETITION FOR REHEARING.

Comes now, Harvey H. Cluff, Attorney General of the State of Utah, and moves the Court for leave to file a brief as amicus curiae in Re: petition for rehearing in the above entitled cause.

He says that the questions involved therein are of great public interest and importance, and vitally concern the whole people of the State of Utah, the final decision of which will materially affect the progress and welfare of Utah and its citizens, for this State is similarly situated as are the States of Colorado and Wyoming, with respect to the uses which may be made of interstate streams, and the rule applied by this Court to the determination of interstate water problems in said States will directly affect and irrevocably determine the rights and

interests of Utah in the same way that it does in the States of Colorado and Wyoming.

The State of Utah therefore has a deep interest in the final decision of this controversy; and if this case should be decided adversely to its rights and interests it is without remedy, and there is no form of proceeding in which it could have that decision revised in this Court, or anywhere else.

He respectfully asks, on behalf of the said sovereign State of Utah, an opportunity to be heard before its rights are concluded, and asserts that if he be so privileged he will prepare and file his brief at the earliest possible date.

HARVEY H. CLUFF,
Attorney General of the State of Utah.
WILLIAM A. HILTON,
Assistant Attorney General.

Copy of the foregoing mailed to the Attorney General of Colorado and of Wyoming this 5th day of September, 1922.

In the Supreme Court of the State of Utah

THE STATE OF WYOMING,
Plaintiff,

vs.

THE STATE OF COLORADO,
Defendant.

BRIEF OF STATE OF UTAH, AS AMICUS CURIAE.

The State of Utah has filed its petition for leave to file a brief amicus curiae in this case, for the reason it feels there is a principle being developed by the court which is of far reaching importance to Utah and of other arid states, and one in which the state of Utah is vitally interested.

There are many questions involved in the case of which we have no concern, and we wish only to direct the court's attention to the one which we consider the paramount issue—that is—the determination as to whether or not the doctrine of prior appropriation shall prevail as among or between states, or the doctrine of equitable apportionment.

In reading the decision of the court in this case, it seems to us that the former principle has been adopted

and is sought to be established as the controlling doctrine, while the court in the Kansas-Colorado case adopted the latter doctrine.

Utah lays claim to being the mother of irrigation in this country and through our experience of over seventy-five years, we are convinced that the only right, just and equitable doctrine to prevail is that of equitable apportionment, after taking into consideration all the effects and results of irrigation on the upper lands of the interstate streams.

We have read with much interest what the attorney general of Colorado has said on this point in his petition for rehearing, and we wish here to endorse and adopt the same as part of our contention.

In order that we may better illustrate our point, let us take the great Colorado basin as our example for development of the agricultural resources within its boundaries. Whether state lines cross the Colorado Basin, matters little, for nature has made the basin a unit which demands for the general prosperity of the southwest and all our whole country that it be developed with approximately equal emphasis throughout its full extent. The natural outlet of the basin is from the Gulf of Mexico up to the Los Angeles country. It is in that direction that the people of the upper reaches of the river may most profitably engage in trade. The climate and the citrous fruits, and the early vegetables, are needed by the people in the upper states, but the people of the lower reaches of the river need the cattle, sheep, potatoes, milling-grain, coal, copper and iron, and other natural resources of the up-

per states. There must be an equal proportionate development of the whole basin to insure the best interests of each separate part. This must be the fundamental thought in the making of any acceptable program relative to the Colorado River. If the court should adopt the hard and fast rule of prior appropriation and permit the people who settle the lower valleys, because of the convenience and more readily accessibility of the streams and fertility of the land, to claim the first and paramount right to the waters of the stream against the people who may settle on the upper reaches of the river, it would of necessity retard the development of the entire basin to the great injury of the whole country. Since the foundation of any commonwealth is agriculture, it follows that in arid and semi-arid countries, irrigation is the first compelling practice, which once properly established will lead to the development of all other resources.

The application of broad and general principles, such as are desirable in the consideration of the great problem of the Colorado River Basin, varies with the quantity of irrigation water available, and the ease of winning it to agricultural purposes.

Experience has demonstrated beyond all doubt that the use of water on the upper lands in time tends to operate as a reservoir and in low water seasons furnishes an increase in the stream for the lower lands. If the lower lands were permitted by reason of prior appropriation to hold the water and not allow the upper settlers to divert it and bring their lands under cultivation, the upper lands must remain barren and unproductive. Within the last

twenty-five years, the duty of water in the older irrigation districts has certainly doubled and the increase is still going on. This is not surprising, since only the relatively small quantity of water taken from the soil by plant roots and evaporated at the leaves, that is, the water transpired—has any real value in plant production. The average rainfall on the upper reaches is nearly sufficient, if conserved, to supply the transpiration needs of crops.

As the art of irrigation advances, less water will be applied to the soil, better cultivation will be practiced, the duty of water will increase and the effective flow of our streams, in terms of acres to be served, will increase correspondingly. The only possible way for the just and equitable rights of individual citizens of the various states to be protected is by the establishment in this country of—once and for all—the doctrine of equitable apportionment of water of interstate streams between or among the states through which such streams may pass.

A very dangerous element in the doctrine of prior appropriation is that it carries with it the feeling of ownership of water irrespective of use. The riparian doctrine of water ownership was rejected by the early western pioneers, and has been found an improper, development-retarding, impossible doctrine wherever irrigation is practiced. The actual or prospective use of water for economic purposes should be, in an arid country, the only foundation for ownership of water. In our day, in the face of the irrigation experience of three quarters of a century, a percentage of quantitative diversion of the waters of the Colorado would be, aside from its unscien-

tific aspects, a grievious reflection upon the possibility of interstate comity, the natural patriotism and harmonious friendliness of these sister states, and a direct affront to the coming generations who would be obliged to untangle our error.

Irrigation is an important feature in the development of the arid west and while it becomes necessary for each state to have its own regulative laws relative to the appropriation of water and the rights of its citizens, it also becomes necessary that a broad equitable view be taken as to the rights of the respective states on interstate streams; that no selfishness be allowed to enter into the right to the use of the waters of such streams, but that conservatism, beneficial use and the best interest for the entire country be the ruling thought and if this is done, the doctrine of equitable division must prevail.

This court is now blazing a new trail, which will effect the future irrigation laws, water rights and development of the entire western country and that trail should be hewed along broad and liberal lines, which shall form the basis of our future irrigation progress and the stable and equitable adjustment of water rights as between states.

All that we have said—using the Colorado basin as an illustration—is true of all sections of the arid west, and because of these facts, Utah is very desirous of having this court sustain the broad rule of equitable division as against the rule of prior appropriation in the settlement of all water disputes between the states. Hence we present this motion as favoring a rehearing of the case, in

the hope that we may have an opportunity to elaborate more fully on the subject in the oral argument before the court.

Respectfully submitted,

HARVEY H. CLUFF,

Attorney General of the State of Utah,

WILLIAM A. HILTON,

Assistant Attorney General of the State of Utah,

Solicitors and Counsel for the State of Utah.

SUPREME COURT OF THE UNITED STATES.

No. 3, Original.—October Term, 1921

The State of Wyoming, Complainant,
vs.
The State of Colorado, the Greeley-Poudre Irrigation District, and the Laramie-Poudre Reservoirs and Irrigation Company.

Modified final decree, October 9, 1922.

1. On consideration of the defendants' petition for a rehearing heretofore presented by leave of the court, it is considered, ordered and decreed that the decree entered herein on June 5, 1922, be modified to read as follows:

This cause having been heretofore submitted on the pleadings and the evidence taken before and reported by the commissioners appointed for the purpose, and the Court being now fully advised in the premises:

It is considered, ordered and decreed that the defendants, their officers, agents and servants, be, and they are hereby, severally enjoined from diverting or taking from the Laramie River and its tributaries in the State of Colorado more than fifteen thousand five hundred (15,500) acre-feet of water per annum in virtue of or through what is designated in the pleadings and evidence as the Laramie-Poudre Tunnel appropriation in that State,

Provided, that this decree shall not prejudice the right of the State of Colorado, or of any one recognized by her as duly entitled thereto, to continue to exercise the right now existing and hereby recognized to divert and take from such stream and its tributaries in that State eighteen thousand (18,000) acre-feet of water per annum in virtue of and through what is designated in the pleadings and evidence as the Skyline Ditch appropriation in that State; nor prejudice the right of that State, or of any one recognized by her as duly entitled thereto, to continue to exercise the right now existing

and hereby recognized to divert and take from such stream and its tributaries in that State four thousand two hundred and fifty (4,250) acre-feet of water per annum in virtue of and through the meadow-land appropriations in that State which are named in the pleadings and evidence; nor prejudice the right of the State of Colorado, or of any one recognized by her as duly entitled thereto, to continue to exercise the right now existing and hereby recognized to divert and take from the headwaters of Deadman Creek, a Colorado tributary of the Laramie River, the relatively small amount of water appropriated therefrom prior to the year 1902 by and through what is designated in the evidence as the Wilson Supply Ditch; nor prejudice or affect the right of the State of Colorado or the State of Wyoming, or of any one recognized by either State as duly entitled thereto, to continue to exercise the right to divert and use water from Sand Creek, sometimes spoken of as a tributary of the Laramie River, in virtue of any existing and lawful appropriation of the waters of such creek;

And it is also considered, ordered and decreed that the costs of this suit be apportioned among and paid by the parties thereto as follows: The State of Wyoming one-third, the State of Colorado one-third, and the two corporate defendants jointly one-third.

And it is further considered, ordered and decreed that the clerk of this Court do transmit to the chief magistrates of the States of Colorado and Wyoming copies of this decree duly authenticated under the seal of this Court.

2. In view of the modifications hereby made in the decree of June 5, 1922, the petition for rehearing in this cause is hereby denied.